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Concepts of Community in Environmental Disputes: Farmersville and Western New York's Garbage Wars

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Concepts of Community in Environmental Disputes: Farmersville and Western New York's Garbage Wars

Gary Abraham***

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I. Introduction

Disputes over commercial landfills have become widely known throughout western New York in such a way as to regionalize the context for each new dispute, reproducing the same issues and the same sorts of parties to the dispute in each new case.¹ About a dozen such disputes have surfaced in the last decade, pitting large developers and state environmental officials on one side as proponents, and local citizens groups on the other, with local municipalities caught in the middle, enticed by the promise of economic benefits but occasionally persuaded by local people they know well that the proposal is not in the best interests of their town. A look at how one such dispute develops can help identify important issues in environmental law and policy.

A. Landfill Disputes and Legal Consciousness

A dispute over a proposal to site a modern commercial landfill is usually accompanied by a heightened legal consciousness among both proponents and opponents that parallels the process that has been found in others areas of law and society. For example, Ewick and Silbey have described how a domestic servant's growing understanding of the impersonal procedures of the criminal justice system within which she became a defendant led her to abandon her initial approach, appealing directly to the judge's sense of fairness. At length she adopted instead a more self-conscious and tactical approach to how she might use the style and procedure of a judicial

¹ Outside the local press, including The Buffalo News, these disputes have attracted little attention. *But see* Daniel A. Spitzer, *Maybe in My Backyard: Strategies for Local Regulation of Private Solid Waste Facilities in New York*, 1 BUFFALO ENVTL L.J. 87 (1993); JANET FITCHEN, *ENDANGERED SPACES, ENDURING PLACES: CHANGE, IDENTITY, AND SURVIVAL IN RURAL AMERICA* (1991). Specific instances of landfill disputes in western New York are mentioned *infra* in the notes to Section III.

proceeding to her advantage.² Similarly, Engel and Munger have described the divergent approaches of two mothers of children with disabilities seeking accommodation from the local school for their child, where one adopts an extra-local consciousness of rights while the other suppresses the consciousness of rights in order to remain identified with the local community. Both approaches arose out of an awareness of the growing importance of legal norms for regulating specific conflicts or disputes about accommodation since passage of the Americans with Disabilities Act of 1990.³

Environmental law has played a similar role in promoting a heightened legal consciousness among parties disputing a landfill proposal. However, the importance of law to a field within which disputes might develop by itself does not explain the role played in landfill disputes by legal consciousness. Landfills are highly regulated by legal norms, but so are many other disputed construction projects that seldom give rise to heightened legal consciousness. An additional element is the inability of the disputing parties to negotiate a resolution to the dispute privately. One or more parties then invokes the extra-local authority of the law, thereby elevating the dispute to the level of a public issue.⁴ At least in the United States, this is commonly the course by which disputes come under judicial review.

Bringing a dispute to judicial review (including administrative review as well as other forms of litigation) does not change the nature of the disputing process so much as it changes the approach of the parties to the dispute. While the role of law is by no means the key to understanding these disputes – environmental law favors developers and public agencies who promote landfills, a lesson opponents learn late in the disputing process much to their dismay – willingness to

² Patricia Ewick & Susan S. Sibley, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENGLAND L. REV. 731 (1992).

³ David M. Engel & Frank W. Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 LAW & SOCIETY REV. 53 (1996).

⁴ See ROBERT L. KIDDER, *CONNECTING LAW AND SOCIETY: AN INTRODUCTION TO RESEARCH AND THEORY* (1983).

resort to the legal forum shows that all parties approach the dispute "objectively" in the sense of accepting that their own private interests must be cast in universal rather than parochial language. This is another aspect of legal consciousness.

The prevailing view on "LULUs" and "NIMBYs," which assumes landfill opponents are motivated by little more than selfishness,⁵ is at odds with the willingness of all sides to employ the very public procedures and standards of the law to adjudicate their dispute. In actual locational disputes each party makes a conscious effort to objectify their private and perhaps selfish interests by casting such interests into more general language. Adopting the NIMBY theory as a resource for analysis gives pride of place to one party's universalization of its interests at the expense of the other's. At least for purposes of understanding a dispute, all positions must be treated as a topic of analysis rather than a resource.⁶

⁵ "LULUs" are "locally unwanted land uses"; "NIMBY" means "not in my back yard." See Robert L. Lake, *Rethinking NIMBY*, APA JOURNAL, 87 (Winter 1993) ("In the NIMBY framework, selfish parochialism generates locational conflict that prevents the attainment of societal goals."). Lake reconsiders the NIMBY phenomenon critically, adopting a political economic approach. However, Lake's approach runs counter to the dominant view, illustrated by the introduction preceding and two articles following his own, which suggest various ways in which opposition to LULUs can be changed to acquiescence ("YIMBY," or "yes in my backyard"). See, e.g., *Commentary: Planners' Alchemy Transforming NIMBY to YIMBY*, APA JOURNAL, *id.* at 87. In these articles landfill opponents are contrasted with landfill developers and state agencies seeking to site landfills who are assumed to be acting out of altruistic regard for the good of the larger community.

⁶ The methodological distinction between approaching social concepts and other ideas in society as a topic to be studied rather than a resource to be used was first emphasized by HAROLD GARFINKLE, *STUDIES IN ETHNOMETHODOLOGY* (1967).

B. A Descriptive Method

Important issues in an area of law and policy are difficult to separate from underlying "stress areas in the social structure of the community."⁷ Looking at the law alone is often not the most productive way to identify what is actually at issue in legal disputes.

Nader and Todd recommend the description of "trouble cases" as a means of identifying "the actual workings of law in society."⁸ Trouble cases are disputes of a specific kind that repeatedly lead to the legal arena.⁹

As has been indicated, the Farmersville landfill dispute is one case in a larger class of disputes of the same kind. A description of this case may therefore provide a means of identifying which issues the people involved perceive to be conflict-engendering and "the relationship into which conflict is structured in that society."¹⁰

Describing the Farmersville landfill dispute also helps pinpoint structural stresses engendered by the way our society is now managing its massive production of solid waste. The people involved in the dispute include interstate commercial actors and state agency staff, local municipalities and their agencies, and concerned citizens. By exporting large amounts of garbage to other states, the state of New York has precipitated a debate about federal legislation that would permit states to control the flow of garbage across their

⁷ Laura Nader & Harry F. Todd, *Introduction*, in *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* 6 (Nader & Todd eds., 1978).

⁸ Nader & Todd, *supra* note 7, at 6 ("The collecting of trouble cases has provided anthropologists with a focus apart from law as a set of rules or customs. It has caused the fieldworker to look at the actual workings of law in society"), and *id.* (quoting KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) ("The trouble-cases, sought out and examined with care, . . . are the safest main road to the discovery of the law. Their data are most certain. Their yield is richest. They are the most revealing.")).

⁹ *Id.*

¹⁰ *Id.* at 8. See also KIDDER, *CONNECTING LAW AND SOCIETY*, *supra* note 4, at 160.

borders,¹¹ causing western New York's "garbage wars"¹² to have implications beyond the borders of that state. Both proponents and opponents of the Farmersville landfill proposal know there is a national context for their dispute.¹³ The "community" of people involved in this dispute cannot therefore be readily distinguished from United States society as a whole.

After outlining the political and economic setting for this dispute, I shall describe the origin and development of this case,

¹¹ See *infra* Sections II (C) and VI.

¹² The term "garbage war" has been applied since the mid-1980s to refer to conflicts between garbage-exporting and garbage-importing states, a topic discussed briefly in the next section. Cf. *infra*, note 40 and accompanying text. It is used here to refer to the conflict between localities under pressure to host a large commercial disposal facility and the facility developers and waste producers who create this pressure. This latter conflict is primarily a rural-urban rather than an interstate conflict. For the rural-urban dimension of such disputes in other regions of the United States, see Al Senia, *With Landfills Full, Garbage Wars Erupt Among Californians*, WASH. POST, Feb. 11, 1982, p. F2; Laurent Belsie, *Town Trenched in Dump "Civil War,"* CHRISTIAN SCI. MON., Nov. 1, 1990, p. 6 (reporting on a dispute over siting a 10,000 ton-per-day landfill in Philippi, a "small, poor county in northern West Virginia"); U.P.I. WIRE, *Paulding landfill issue dumps controversy into community*, July 31, 1988 (reporting on a similar dispute in Paulding County, Georgia); *Convalescent Home Legislation Backed*, CHICAGO TRIBUNE, April 12, 1989, p. D3 (reporting, inter alia, on legislation passed by rural DuPage County, Illinois, in the context of "'garbage wars' between Chicago-area and Downstate counties in Illinois"); Nate Blakeslee, *The West Texas Waste Wars*, TEXAS OBSERVER, March 28, 1997 <<http://texasobserver.org/subjects/enviro/wastewar.html>> (reporting on dumping of low level nuclear waste and New York City sewage sludge waste in a predominantly low-income Mexican-American community). For observations on the same phenomenon in New York City, see James Bradley, *Garbage Wars*, CITY LIMITS (New York City) (Jan. 1998) <<http://www.citylimits.org/archives/9801garb.htm>>. (Unless noted otherwise, all online cites in this Article were last visited September 15, 1999).

¹³ Variations and contrasting uses of this local knowledge are discussed *infra* in Sections III and IV.

which is typical of western New York's garbage wars.¹⁴ What this dispute suggests about the role of law and legal consciousness in environmental and land use decision making is discussed in the conclusion.

II. The Political and Economic Setting

A. The Market for Waste

Western New York communities are under pressure from an extra-local market for waste to host large commercial landfills. However, the economics of waste is embedded in political forces that create and maintain the need for garbage dumps. By failing to promote local responsibility for urban waste production, and by restricting legitimate local governmental powers of rural municipalities, New York statutory and administrative policies help create the market forces that provide the setting for western New York's garbage wars.

Since September 1, 1992, when the New York Solid Waste Management Act of 1988 required all municipalities to adopt a local law or ordinance requiring separation of recyclable and reusable material from other solid waste,¹⁵ rural western New York counties have responded by implementing pay-as-you-go recycling programs requiring payments of \$1.00 to \$1.50 to dispose of each 30-gallon bag of unrecycled garbage, \$2.00 per item for bulky solid wastes (such as a chair or mattress), and making available free disposal of separated plastic, clear glass, colored glass, tin and aluminum, batteries, junk mail, magazines, newspapers, tires, waste oil, and household

¹⁴ See Spitzer, *supra* note 1, at 88-89 ("The Farmersville story is not unique. The garbage crisis in this country is increasingly making the rural areas of New York State the location of choice for the solid waste industry. Communities are often overwhelmed by the vast resources of the landfill operators, promises of economic prosperity, and threats of legal action. Few resources are available to aid these communities in evaluating their options.").

¹⁵ SOLID WASTE MANAGEMENT ACT OF 1988, N.Y. Laws 1988 ch 70.

hazardous wastes.¹⁶ Within two years Cattaraugus County, where Farmersville is located, recycled 32 percent of its waste stream (totaling 52,000 tons of solid waste).¹⁷ In 1998 that figure reached 40 percent.¹⁸ By contrast, the New York City metropolitan area has yet to implement comparable recycling programs. Today no more than 16 percent of New York City's waste stream is recycled.¹⁹

¹⁶ E.g., VILLAGE OF ALLEGANY RECYCLING GUIDE (July 14, 1995) (on file with author), pursuant to Cattaraugus County waste regulations. *Catt. Co. Trash*, THE INDEPENDENT (Olean), May 21, 1994, p. 4. For the success of pay-as-you-go disposal policies generally, see *infra* note 22.

¹⁷ Rick Miller, *Cattaraugus County Saves \$1.2 million by Recycling*, TIMES HERALD (Olean, NY), April 21, 1995, p. A-5.

¹⁸ Correspondence from Richard R. Preston, Waste Management Analyst, Cattaraugus County Department of Public Works, March 12, 1999 (on file with author).

¹⁹ Legislative Commission on Solid Waste Management, WHERE WILL THE GARBAGE GO?--1998 (Albany, July 1998), p. 16 ("Tons reported recycled by the City in 1997 (approximately 1.2 million tons) represent about 15.7% of the reported waste stream."). New York City's reported recycling rate should, however, be treated with considerable skepticism. Although the 1989 New York City Recycling Law mandates the creation of recycling centers with the capacity to take 4,250 tons per day out of the over 8-million-ton annual residential waste stream (less than half of New York City's total waste stream), the city's Department of Sanitation has held up implementation of the law and attempted to inflate reported recycling rates by including construction and demolition debris among recyclables until the practice was struck down as a result of litigation. See *Natural Resources Defense Council, Inc., et al. v. New York City Department of Sanitation*, 631 N.Y.S.2d 10 (1st Dept. 1995); *Natural Resources Defense Council, Inc., et al. v. New York City Department of Sanitation*, 669 N.Y.S.2d 37 (1st Dept. 1998). The 1998 Appellate Division decision affirmed a 1997 order of Supreme Court, New York County, which "directs the city to increase recycling from about 2,300 tons per day at present to 3,400 tons per day in July 1999 and 4,250 tons per day in July 2001." *Recycling Policy: Court Orders New York City to Boost Recycling Rate Over Next Four Years*. 28 SOLID WASTE REPORT (June 5, 1997). See also Editorial, *Dear Rudy, re 'exports': Not in our backyard*, BUFFALO NEWS, Dec. 4, 1996 (reporting that New York City Mayor Rudolph Giuliani reduced funds for recycling). For a comprehensive analysis of recycling in New York City and New York State, see Heather Behnke, Kathleen M. Bennett, & Amy L. DuVall, *Recycling: Anything But Garbage*, 5 BUFF. ENVTL. L.J. 101 (1997); cf. John B. McCrory, *New York City, The First Regional Government Still Cries for Planning:*

This disparity in recycling rates cannot be explained by physical, financial, or even local legislative barriers to recycling. Theoretically²⁰ New York City residents should benefit from an economy of scale compared to their rural cousins, who often must transport household garbage and recyclables on their own to the local town's transfer station.²¹ The city's recycling plan today still lacks financial incentives for residents to reduce household waste, and results in a fraction of the waste stream reduction achieved by New York's small cities, villages, and rural municipalities.²² Landfilling is the waste management option of choice for the city.

The Case of Waste Management, 128 PLANNING NETWORK ONLINE (1998), <<http://www.plannersnetwork.org/128/McCrory.htm>> or <<http://pratt.edu/~jmccrory/bags/history.html>>. Behnke et al., *supra* at 126-27, report an actual recycling rate of 14 percent for New York City, which contributes over one-half of the 17.4 million tons per year produced by New York State as a whole for disposal. *Id.*, text at n.155 (citing Natural Resources Defense Council figures, <<http://www.nrdc.org/bkgrd/gastate.html>> (reporting a statewide waste stream of 25.5 tons per year in 1995, of which 32 percent was diverted by recycling)).

²⁰ "Only about eight percent of what goes into a landfill is non-recyclable." Behnke et al., *supra* note 19, at 136 (quoting *Refuse Collection*, PUBLIC WORKS (Apr. 15, 1995), at E-11).

²¹ New York City's 1989 recycling law requires owners of apartment buildings to manage recycling programs in their buildings. Behnke et al., *supra* note 19, at 122 (citing ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 16-305(f) (1992 & Supp. 1996)). That provision of the law has, however, never been implemented. *Cf. id.* at 125. New York City's five boroughs have 36 transfer stations (down from 44 in 1992), compared to 105 in western New York's 14 counties and 74 in the seven counties immediately north of the City. WHERE WILL THE GARBAGE GO?--1998, *supra* note 19, at 18 ("Table 9, Transfer Stations Accepting MSW by DEC Region, 1992 to 1997").

²² See Behnke et al., *supra* note 19, at 148-54 (comparing recycling programs in thousands of cities nationwide and internationally, and concluding that "pay-as-you-throw" programs, which require payment for non-recyclable household trash disposal, are more successful than purely voluntary recycling programs). See also U.S.-EPA Office of Solid Waste, PAY-AS-YOU-THROW ONLINE, <<http://www/epa.gov/payt/>>.

Most of the 28 active landfills in New York are run by municipalities taking local waste, accepting on average less than 100,000 tons of waste per year ("tpy").²³ However, the picture changes if we look only at commercial landfills. There are six of these, accepting on average five times more garbage than publicly-owned landfills, and all are located in western New York.²⁴

The growth of landfill capacity shows an even more dramatic regional inequity. Although the volume of waste being landfilled

²³ NYSDEC, Division of Solid and Hazardous Materials, CAPACITY DATA FOR LANDFILLS AND WASTE TO ENERGY FACILITIES (July 7, 1999) (table on file with author). There are, however, eight publicly-owned solid waste incinerators accepting substantially more waste, 2.72 million tons in 1998, averaging 339,964 tons. *Id.* The higher capacity of these incinerators is due to their location, in Long Island and the New York City metropolitan area. However, the largest incinerator in the state is the privately-owned American Ref-Fuel facility in Niagara Falls, which accepted 755,593 tons of solid waste in 1998. *Id.*

²⁴ *Id.* A seventh private landfill listed was denied a permit to expand in 1999. *In the Matter of the Application of Al Turi Landfill, Inc. for a permit to construct and operate an expansion of its solid waste landfill in the Town of Goshen, Orange County* (DEC Application No. 3-3330-00002-21), Decision of the Commissioner, April 15, 1999 <<http://www.dec.state.ny.us/eb/site/ohms/decis/alturid.htm>>. The Al Turi Landfill's permit limits its capacity to 427,000 tpy, but it accepted only 65,232 tons in 1998. NYSDEC, CAPACITY DATA, *supra* note 23. The largest landfill in New York, however, is the municipally-owned Fresh Kills Landfill in New York City, the only landfill in Region 2. Waste landfilled at Fresh Kills declined from the 3.9 million tpy in 1995 to 3.46 million tpy in 1997. Legislative Commission on Solid Waste Management, WHERE WILL THE GARBAGE GO?—1996 (Albany, July 1996), page 20, "Table 10, NYS Waste Management in 1995 by DEC Region"; WHERE WILL THE GARBAGE GO?—1998, *supra* note 19, at 14 ("Table 7, NYS Waste management in 1997 by DEC Region"). The same disparity in size between local publicly-owned and commercial landfills has recently been found in Virginia. *Waste Management Holdings, Inc. v. Gilmore*, No. Civ.A. 3:99CV425, 1999 WL 689925, * 1-2 (E.D.Va. June 30, 1999) ("Seven [commercial] 'regional' landfills account for 97% of the out-of-state waste deposited in Virginia. Approximately 61 [publicly-owned] 'local' landfills accept no out-of-state waste at all . . . [and according to Virginia's DEQ] '[m]ost landfills operated by local governments receive less than 100 tons per day; a few receive closer to 500 tons per day'" while all seven commercial landfills receive over 2000 tons per day).

commercially in New York is falling dramatically,²⁵ New York State's policy of achieving "self-sufficiency" in landfill capacity has increased the permitted capacity of commercial landfills in western New York from one million tons per year of excess capacity in 1992 to over 20 million tons in 1999.²⁶ Western New York is therefore providing most of the landfill capacity, after export, for the state's cities.

B. The Legal and Public Policy Context in New York

In New York State sponsors of commercial landfills must acquire both a local and a state permit. Failing to acquire either permit destroys a siting proposal. As awareness of the economic and political forces underlying local landfill sitings increases, municipalities can turn to landfill bans, zoning, or local site plan review regulations to achieve local self-determination.²⁷ However,

²⁵ WHERE WILL THE GARBAGE GO?—1998, *supra* note 19 ("Table 7") (subtracting Fresh Kills, reporting 5.58 million tons landfilled in New York in 1997); NYSDEC, CAPACITY DATA, *supra* note 23 (excluding Fresh Kills, reporting 2.88 million tons landfilled in New York in 1998).

²⁶ In 1993 Director of DEC's Division of Solid Waste, Phyllis Atwater, reported to the state legislature's Solid Waste Management Board: "Approximately 1 million tons per year of excess landfill capacity was available in New York State in 1992. Most of the excess capacity, however, existed in the western portion of the state in [DEC] Regions 8 and 9." *Solid Waste Director Offers Disposal Capacity Analysis*, 3 N.Y. WASTE REP. 5 (Aug. 1993). "Two years ago, we undertook a revision to the regulations concerning landfill sightings [sic] in the state of New York, which increased the capacity of New York State by 50 million tons." Federal News Service, HEARING OF THE STATE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE (Sen. John Chafee (RI), Chair), March 18, 1997 (testimony of DEC Commissioner John Cahill). NYSDEC, CAPACITY DATA, *supra* note 23 (reporting 1999 permitted capacity for six commercial landfills is 20.52 million tpy). DEC reports capacity increases currently "proposed or discussed with DEC" for these six landfills alone would add another 44.65 million tons. *Id.* The revision to the regulations referred to in 1977 by Commissioner Cahill, adding the goal of state-wide "self-sufficiency," is discussed *infra* note 31.

²⁷ In New York the police power is delegated to municipalities unless superceded or preempted by state enactment. N.Y. CONST., Art. IX § 2 [c] [ii] [10] (general police power delegated to counties and towns); Municipal Home Rule Law

landfill developers typically attempt to circumvent local powers either by initiating quiet contacts with local government officials to strike a deal,²⁸ or by optioning land, submitting an application for a state Department of Environmental Conservation (DEC) permit and then leveraging the likelihood of a DEC permit for local approval by threatening litigation, on the theory that the likelihood of a state permit gives the developer a property right.²⁹ Both sides know that

(MHRL) §10(1)(ii)(a)(11), (12) (the same). *See also* N.Y. CONST., Art. IX § 3 [c] (the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed"); MUNICIPAL HOME RULE L. § 51 ("[t]his chapter shall be liberally construed"). *See* J.D. Hyman, *Home Rule in New York, 1941-1965: Retrospect and Prospect*, 15 BUFF. L. REV. 335 (1965); Spitzer, *supra*, note 1. The constitutional bases for home rule in New York have not changed substantially since 1964. *See also* David Debo, *Landfill Sitings Prompt Action from Town Boards*, BUSINESS FIRST OF BUFFALO, August 22, 1994, p. 9 (reporting on ways the western New York towns of Eagle, Farmersville and Allen have sought to control or encourage landfill siting).

²⁸ As has happened in Eagle, N.Y. *See BFI Circulates Landfill Proposal in Town of Eagle*, 3 N. Y. WASTE REP., p. 4c (Sept., 1993); and in Allen, N.Y., despite the town's previous enactment of a landfill ban law: *see* John Anderson, *Allen Discusses CID Landfill*, TIMES HERALD (Olean, NY), Jan. 8, 1997, p. A7; *Allen Town Officials May Loosen Landfill Restrictions*, TIMES HERALD, Feb. 10, 1997, p. A7; *Allen Residents Raise Stink Over Landfill Plan*, TIMES HERALD, Feb. 12, 1997, p. A5.

²⁹ As happened in Farmersville, N.Y. *See infra* Section III. A combination of these two strategies was pursued in Angelica, NY, where an ash landfill developer ultimately prevailed against a town that had enacted a landfill ban law some years earlier. The developer submitted a DEC permit application anyway and, when granted the state permit, brought a commerce clause challenge against the ban law. After spending more than \$100,000 to defend itself in court, voters elected a town board willing to negotiate a settlement that included rescinding the ban law. Among numerous articles in the local press *see* John Anderson, *Town of Angelica Discusses Highland [sic] Landfill Situation*, TIMES HERALD, p. A6; *Angelica Voters Elect Candidates Who Back Ash Dump*, TIMES HERALD, Nov. 9, 1995, p. A5; Kathryn Ross, *Angelica Ashfill Heats Up; Protest Action Planned*, PATRIOT AND FREE PRESS (Angelica, NY), Feb. 21-27, 1996, p. 5A; Rick Jozwiak, *Landfill Developer Drops Suit in Angelica*, TIMES HERALD, Sept. 10, 1996, p. A6; Tracy Riordan, *More Arrested at Angelica Dump Site*, TIMES HERALD, Nov. 1, 1996, p. A1.

during the progress of litigation this likelihood grows greater and greater. The advantage to developers of applying for a DEC permit first arises from the restricted role the local public plays in the DEC review process.

DEC review of an application for a state permit is not designed to facilitate public input.³⁰ Moreover, the input of public bodies, whether of the town hosting the dump, neighboring towns directly impacted by the dump, or the host county, falls low on the DEC's list of priorities. The DEC's primary concern is to provide adequate landfill capacity for New York State as a whole.³¹ This policy priority was developed in the wake of the state legislature's 1996 decision to close New York City's Fresh Kills Landfill³² and earlier efforts to enact federal flow control legislation.³³

³⁰ Michael B. Gerrard, *The Dynamics of Secrecy in the Environmental Impact Statement Process*, 2 N.Y.U. ENVTL L. J. 279 (1993). For a richer description of the obstacles to public input in hazardous waste facility siting see R. Nils Olsen, Jr., *The Concentration of Commercial Hazardous Waste Facilities in the Western New York Community*, 39 BUFF. L. REV. 473 (1991). The procedural steps in the DEC's review of a hazardous waste disposal facility are closely paralleled in the solid waste landfill siting process.

³¹ "New York's solid waste management plan lists self-sufficiency in the management of municipal solid waste as a state objective due to the following uncertainties related to out-of-state waste exportation: (1) Potential bans or limits on interstate waste disposal by the U.S. government or receiving states; (2) Unforeseen closure of receiving facilities; (3) Uncontrolled escalation of interstate disposal and transportation costs; and (4) Uncertain long-term, out-of-state capacity." *In the Matter of the Application of Al Turi Landfill*, *supra* note 24, "Findings of Fact," para. 82 (citing DEC Technical Administrative Guidance Memorandum, DSHM-96-02, *Review of Local Solid Waste Management Plans* (June 4, 1996), <<http://www.dec.state.ny.us/website/dshm/regs/dshm9602.htm>>).

³² 1996 N.Y. LAWS ch 170.

³³ See *supra* note 26. "Flow control" legislative initiatives are discussed *infra* Subsection (C) and Section VI.

A sparse population³⁴ and a high poverty rate³⁵ hamper the ability of rural western New York communities to change policy priorities at the DEC. With county populations under 100,000, the voting power of rural western New York at the state level is negligible.

Adding to the local impression and reality of regional inequity is the virtual absence of any local need for additional landfills. For example, in contrast to the 35,000 tons of waste landfilled by Cattaraugus County in 1994,³⁶ the proposed capacity of the Farmersville landfill in Cattaraugus County is over 16 million tons per year, to be imported from within 300 miles of Farmersville.³⁷

³⁴ In land area one of the largest counties in New York, the population of Cattaraugus County is only about 85,000. The three western southern tier counties, Chautauqua, Cattaraugus, and Allegany, come within the purview of the federal Appalachian Regional Commission (ARC), created under the Johnson administration as part of the "War on Poverty." Elsewhere in the region poor townships are not hard to find. *Cf.* ARC website, THE APPALACHIAN REGION, <<http://arc.gov/aboutarc/region/abtapreg.htm>> (link to list of 14 New York counties in the region); Southern Tier West, 1998 REGIONAL DEVELOPMENT STRATEGY, <<http://www.southerntierwest.org/page7.htm>> (comprehensive socioeconomic data).

³⁵ With 12 of the poorest 25 municipalities in western New York, Cattaraugus County has the greatest number of high poverty rate communities in the region. G. Scott Thomas, *WNY Poverty Rates*, BUSINESS FIRST OF BUFFALO, Sept. 5, 1994, p. 12 (table, 1990 U.S. Census figures).

³⁶ Miller, *Cattaraugus County Saves*, *supra* note 17.

³⁷ NYSDEC, CAPACITY DATA, *supra* note 23 (column, "Proposed Capacity Not Under Permit").

C. The Legal and Public Policy Context Beyond New York

For many years New York State has been one of the largest exporters of solid waste of any of the United States.³⁸ New York's role as a garbage exporter is facilitated by the Commerce Clause of the U.S. Constitution, which prohibits restrictions on the interstate transport of garbage.³⁹ Application of the Commerce Clause to garbage ensures an interstate market for waste which, in turn, tends to relieve pressure on western New York.

However, "flow control" legislation from the U.S. Congress, which would permit states to control how much garbage flows across their borders, could override application of the Commerce Clause to garbage. Since the early 1990s speculation that legislative action or political pressure short of legislative action will restrict New York's ability to continue to export its garbage⁴⁰ has kept the pressure up to site landfills in western New York.

³⁸ Of the 3.8 million tons of solid waste exported annually from New York State in 1991, 2.9 million tons came from New York City; the second largest producer of solid waste, the Town of Oyster Bay, produced 264,000 tons of garbage. Stephen L. Kass & Michael B. Gerrard, *Whither New York's Wastes?*, N.Y.L.J., Jan. 28, 1994. From 1991 to 1995 state exports rose to a maximum of 4.4 million tons and then returned, in 1995, to 3.8 million tons. However, throughout the period New York City's share of exports remained constant at 2.9 million tons. *WHERE WILL THE GARBAGE GO?—1996*, *supra* note 25, at 19 (Table 9).

³⁹ *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (solid waste is an article of commerce and is therefore subject to the protection of Commerce Clause); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (local "flow control" legislation discriminates against out of state garbage haulers and is therefore in violation of the Commerce Clause).

⁴⁰ Garbage industry interests have long promoted flow control, hoping to force states adjacent to large-capacity states like Pennsylvania to construct new facilities. Spitzer, *supra* note 1, at 92; William H. Miller, *Toxics, Permits, Garbage Wars*, *INDUSTRY WEEK*, May 4, 1992, p. 20 ("... industry wouldn't mind passage this year of bare-bones [federal] legislation that would address interstate transportation of solid waste, ending the 'garbage wars' between the states.").

The primary impetus for flow control legislation comes from states hosting large commercial landfills that rely on New York garbage. In 1995 Pennsylvania hosted 2.7 million tons of waste from New York State, most of it from New York City and Long Island.⁴¹ In 1998 Pennsylvania accepted 9.8 million tons of imported municipal waste.⁴² Today Virginia and Ohio are also significant importers of New York garbage.

In 1995 nearly half the nation's governors asked the House Commerce Committee to send a flow control bill sponsored by Michael Oxley (Ohio) to Congress for a vote. In a letter to the Committee the governors complained about their "limited ability to place restrictions on shipments of unwanted garbage from other states."⁴³ Flow control legislation came close to passing in 1997.⁴⁴ Flow control legislation was again introduced in the 1999 Congress.⁴⁵

⁴¹ *Congressman Says Politics Blocking Trash Legislation*, A.P. WIRE, June 6, 1996.

⁴² Anick Jesdanun, *Specter Seeks to Restrict Garbage Load*, TIMES HERALD (A.P. Wire), March 19, 1999, p. 1. See also Pennsylvania Environmental Network, WELCOME TO PENNSYLVANIA, AMERICA DUMPS HERE, <<http://www.penweb.org/issues/waste/importation/index.html>>.

⁴³ *Interstate Shipments: Governors Ask Commerce Committee to Leave Interstate Waste Bill Intact*, SOLID WASTE REPORT, June 29, 1995.

⁴⁴ H.R. 942, introduced on March 5, 1997, "contains the exact language of interstate waste transportation provisions in [a] Senate bill that passed twice in the 104th Congress." This would have allowed states to phase down the amount of out-of-state solid waste they accept. H.R. 943, introduced on the same day, would have given state and local governments flow control authority "to guarantee the designated facility a set amount of municipal solid waste, and in turn guarantees the state or local governments a certain level of revenues from the tipping fees the facility charges for every load of solid waste accepted." These House bills followed introduction of S. 384 in the Senate, which "would give broad authority to governors to limit and prohibit out-of-state shipments of municipal solid waste. The bill represents the interests of the Midwestern states that are trying to preserve their landfills from solid waste generated in states that generally export their garbage, such as New York." *Solid Waste: New Jersey Lawmaker Introduces Interstate, Flow Control Bills to Begin Debate in House*, 46 BNA DAILY ENV'T. REP., p. D14 (March 10, 1997).

⁴⁵ See *infra* Section VI.

In response to the politicization of interstate inequity New York's DEC in 1996 adopted a policy of "self-sufficiency," a policy that has fueled continued commercial speculation in the value of upstate New York landfill space.⁴⁶

Within New York regional inequity in landfill siting is likely to increase significantly in the coming years because New York City's only local site for waste disposal will soon close. A closure deadline of December 31, 2001, for the Fresh Kills Landfill in Staten Island is mandated by state law.⁴⁷ Fresh Kills is the largest landfill in the state, and may be larger than any other in the world. Following the 1996 announcement of the closure plan, New York City's Sanitation Commissioner said the likely destination of the 13,000 tons per day of residential garbage now sent to Fresh Kills is landfills in other parts of the state, as well as landfills in Pennsylvania, Ohio, and Virginia.⁴⁸ Responding directly to this statement, in the context of the

⁴⁶ See *supra*, notes 26 and 31. However, actual adoption of a policy of self-sufficiency may have predated 1996. See *infra* text accompanying note 84.

⁴⁷ *Supra* note 32.

⁴⁸ Vivian S. Troy, *Despite Years of Broken Promises, Accord Vows to Close S.I. Landfill*, N. Y. TIMES, METRO ED., May 30, 1996. There is also pressure to landfill Canadian garbage in western New York. To discourage further landfill siting in the province, Ontario legislation increased dumping rates to \$150 per ton, making it economically viable to transport garbage from there to landfills in Pennsylvania, Ohio, West Virginia and Indiana, where dumping fees are about \$20, below the current market rate in western New York. Editorial, *End Canadian Garbage Run: It's Enough That We Find Space For Our Own*, BUFFALO NEWS, Jan. 23, 1993, p. 2 (reporting that "20-ton trailer trucks rumble around-the-clock over the Peace Bridge . . . without a health inspection," and that U.S. Representative Bill Paxton, R-Amherst, promises to push for a halt to Canadian transport of garbage into the U.S., from his post on the House Energy and Commerce Committee). In September, 1999, Toronto announced it was rapidly running out of landfill space and would select a new landfill in a neighboring province or Michigan, Ohio, or New York. Solid Waste Online, *Toronto to Make Landfill Choice* (Sept. 7, 1999) <<http://www2.solidwaste.com/content/news/article.asp?DocID={8FCA2B52-62DC-11D3-9A60-00A0C9C83AFB}&Bucket=Top+Headline>>.

dispute described in the next Section below, the Cattaraugus County Legislature passed resolutions "opposing importation of urban solid waste" and urging all towns in the county to enact local legislation severely restricting landfills.⁴⁹

III. Farmersville: Parties to the Dispute⁵⁰

The battle over Farmersville may be the most protracted dispute over a landfill in New York State history. Due to local official and citizen opposition, as of this writing (September 15, 1999) the proposal to site a commercial solid waste landfill in the Town of Farmersville in northeastern Cattaraugus County is still under review by the DEC.

⁴⁹ Cattaraugus County, ACT NO. 327-96, OPPOSING IMPORTATION OF URBAN SOLID WASTE INTO WESTERN NEW YORK; ACT NO. 328-96, REQUESTING NYSDEC CONDUCT SEQR SCOPING SESSIONS FOR PROPOSED SOUTHERN TIER SANITARY LANDFILL [IN FARMERSVILLE]; ACT NO. 329-96, URGING ALL TOWNS AND CITIES IN CATTARAUGUS COUNTY REQUEST NYSDEC TO PROVIDE SEQR SCOPING SESSIONS FOR PROPOSED SOUTHERN TIER SANITARY LANDFILL; ACT NO. 330-96, SUGGESTING ALL TOWNS AND CITIES IN CATTARAUGUS COUNTY ENACT LEGISLATION REGARDING LOCALLY UNWANTED LAND USES. All resolutions were passed on June 5, 1996. See Donna Synder, *Bringing Garbage Into Area Opposed*, BUFFALO NEWS, June 14, 1996, Local Section, p. 5B ("In a resolution to be sent to Gov. Pataki and other state leaders, [Cattaraugus County] legislators said that local efforts to reduce solid waste through recycling have been successful and just because New York City has lagged in those efforts, counties such as Cattaraugus should not be penalized by required to take downstate garbage.").

⁵⁰ The information that follows is based on personal communications with local residents, public officials and DEC officials; records of deliberations of the municipal government bodies discussed; newsletters published by the citizens group discussed; my own involvement in CCCC and contact with other citizens groups in the region, which began in the summer of 1992; and my participation in the Farmersville Task Force of the Cattaraugus County Legislature, which began in 1995. Selected local newspaper articles covering the events discussed are cited wherever possible. However filed notes and unpublished sources on file with the Author are not cited unless specifically quoted.

A. Where is Farmersville?

Farmersville, whose registered voters number about 650, is a strikingly beautiful place in the hinterlands between Buffalo and Olean, a small city on New York's border with Pennsylvania alongside the upper Allegheny River. Farmersville's high-elevation broadly rolling hills approach the foothills of the Allegheny Mountains, about 50 miles south of Buffalo at the northern headwaters of Ischua Creek.⁵¹ Beneath the Ischua Creek lies an aquifer that supplies drinking water to the Village of Franklinville, bordering Farmersville to the south, to Olean, the population center of the county about 20 miles further south,⁵² and to a few hundred residential well-water users between Farmersville and Olean. Farmersville Station, a four-corners at the site of a long abandoned train stop, is the only concentration of population in the town with about two dozen homes. Although barns and silos are a prominent feature of the landscape, few people earn their living from farming. Farming activities are almost always undertaken for marginal income (bee-keeping, timber or maple syrup extraction) or immediate consumption (a few head of cattle, backyard farming). Unemployment and underemployment are high, and most people work outside Farmersville. There are a small but prominent number of "transplants," middle-income people who have chosen to live out-of-the-way. Farmersville children attend school in nearby Franklinville.

Discovery in 1990 that a landfill developer had, by underhanded means, struck a deal with the Farmersville Town Board led quickly to opposition to the landfill proposal by downstream municipal officials in the Village Franklinville, the City of Olean, and

⁵¹ These foothills are known locally as the "Enchanted Mountains."

⁵² In addition, the City of Olean relies for a portion of its drinking water on the surface waters of the Ischua Creek itself, waters described as "pristine" in an independent study commissioned by the City. Testimony of City of Olean Mayor James Griffin at March 24, 1999, Scoping Meeting on the Farmersville Project Proposal (discussed *infra* Section VI).

officials of the Cattaraugus County legislature and county planning, health, and public works departments, and to particularly vociferous opposition by a substantial number of Farmersville and Franklinville residents. All of the opponents to the proposal disputed the ability of the local community to sustain the impacts of the proposed project. The developer offered substantial financial benefits to the Town of Farmersville, but otherwise disputed all claims as to adverse impacts on the surrounding community. The DEC, representing the interests of the State of New York and therefore defining the community as the entire state, disregarded all arguments in opposition about non-physical community impacts, notwithstanding the broad definition of "environment" under New York law that, in principle, requires meaningful review of such impacts.⁵³

After 1990 the dispute crystalized around lengthy DEC proceedings reviewing the developer's preliminary permit application.⁵⁴ Five entities who applied for formal party status in the review proceedings were recognized by the DEC administrative law judge. The Town of Farmersville ultimately opposed the landfill. This put a powerful state agency (the Department of Environmental Conservation) and a landfill developer on one side, as proponents of

⁵³ New York's STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), N.Y. Envtl. Conserv. L. (hereafter NY-ECL) §§8-0101 et seq. (West 1996), was enacted in 1975 pursuant to the federal National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370c (1996). Under SEQRA, NEPA's requirement that an environmental impact statement be prepared by governmental agencies, 40 C.F.R. §1506.5(b), is imposed on private applicants. NY-ECL § 8-0109(2). SEQRA defines "environment" much more broadly than does NEPA, to include "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, *existing patterns of population concentration, distribution or growth, and existing community or neighborhood character.*" NY-ECL § 8-0105(6) (emphases added).

⁵⁴ See *infra* Section IV.

the proposal, with the Town, the County and City of Olean, and a "concerned citizens" group on the other side in opposition. The following sketches the parties to the dispute and the initial approach each took to the controversy.

B. The Landfill Developer

In 1989 Integrated Waste Systems, Inc. (IWS), a Buffalo-based garbage collection company with previous ties to organized crime,⁵⁵ investigated the town records of Farmersville to determine whether the town had a landfill ban in effect. Failing to find a 1953 Farmersville law banning landfills (which the Town itself discovered only in the following year), IWS cultivated a relationship with a purchasing middleman to acquire an interest in 450 acres in Farmersville, on a steep slope with a number of springs and small wetlands on and immediately adjacent to the site.

In late 1989 the recently widowed Leah Burlingame agreed to sell her 35-acre farm after IWS agent Bill Heitzenrater and Buffalo-area junkyard owner Ken Lefler told her they wanted the land

⁵⁵ Letter of April 2, 1992 to DEC Commissioner Thomas Jorling from Maurice Hinchey, who was then a New York State Assemblyman and chair of the Legislative Committee on Solid Waste. According to Hinchey's letter, CEO of IWS Harry Williams and other IWS affiliates have been investigated by the New York State Organized Crime Task Force and the Kansas City Organized Crime Strike Force; Mr. Williams has been charged with racketeering for the bribery of a Niagara Falls city manager to obtain a contract to clean up Love Canal ("The official was offered cash, a mortgage guarantee, and a job with a subsidiary in Florida"), for liability for radioactive groundwater pollution at the Niagara Falls facility, and for illegally dumping hazardous waste in an Ohio landfill. Hinchey hoped that these and other allegations against IWS would become the basis for a special investigation of the company under DEC's 1991 Record of Compliance (Bad Actor) Enforcement Directive. As of the date of this writing whether DEC will undertake a bad actor investigation is undecided. Mr. Hinchey is today a member of the U.S. House of Representatives.

for a campground.⁵⁶ Next door Robyn Burrell, heavily in debt to the Farmers Home Administration, was milking his cows when Heitzenrater and Lefler, who had adjoining family property, approached him with \$2,000 cash in hand and with the same pitch and, when the two told him he could be the caretaker of the campground, Burrell sold his 189-acre farm on the spot.⁵⁷ The next spring, however, Mrs. Burlingame was shocked to see Heitzenrater at a Farmersville Town Board meeting announcing, on behalf of IWS, the combined parcel would be used to landfill 3,000 tons per day of metropolitan garbage.⁵⁸ When asked by one citizen why IWS would threaten water quality for local people who rely on wells close to the proposed dump site, Heitzenrater replied that it was precisely the pristine quality of groundwater in the area that attracted IWS, since it would take much longer to reach levels of contamination permitted under state regulations than other sites. Soon thereafter Burrell and his wife were kicked off the land, still \$20,000 in debt, and with no job offer from IWS.⁵⁹

Local residents had already become suspicious when, after the winter weather broke in 1990, IWS began drilling on the site. In June of 1990 an Olean-based environmental group notified the Farmersville Town Board about IWS's background. But it was too late, a deal was already in the making. As residents in the Farmersville and Franklinville area began to mobilize against the landfill proposal, IWS was meeting with Farmersville Town Board members behind closed doors, promising to pay all residents' town, county, and property taxes.⁶⁰ Having secured a deal with the Town Board, IWS purchased an option on the combined 450-acre parcel

⁵⁶ Michael Beebe, *Duped on Dump, Landowners Say*, BUFFALO NEWS, Sept. 8, 1991, pp. A1, A12; *Junkyard Owner's Land Deal Stuns Farmersville*, BUFFALO NEWS, Oct. 13, 1991, pp. A1, A13.

⁵⁷ Beebe, *Duped on Dump*, *supra*, note 56.

⁵⁸ Beebe, *Junkyard Owner's Land Deal*, *supra* note 56.

⁵⁹ *Id.*

⁶⁰ Rick Miller, *Prospective Landfill Owner Says It Would Pay Farmersville Taxes*, TIMES HERALD, July 5, 1990, p. 1.

from Lefler, who was reportedly offered a job with IWS in Florida, and in July IWS applied for a state permit to operate a landfill on the site.

However, in late 1990 the Town Clerk found the 1953 local ordinance banning landfills in the Town.⁶¹ IWS thereupon sued the Town seeking a declaratory judgment that the local law did not apply to its landfill proposal and attacking the validity of the law on constitutional grounds. In an attempt to avoid prolonged litigation, before the year was out the Town enacted new landfill regulations repealing the old law. In April, 1991, IWS again sued the Town alleging the Town's failure to properly consider the environmental impacts of its action enacting the new landfill ordinance. This convinced the Town to finally enact local legislation more to IWS's liking the following month. Although like the 1990 local law, no environmental findings accompanied the 1991 local law, and IWS left the Town alone.

The day after the four-month limitation period for challenging the 1991 law expired, IWS executed an agreement to drop its two lawsuits in exchange for a commitment from the Town to grant a local permit for a landfill to IWS should the company obtain a state permit. The Town Board devoted seventeen minutes to review before taking a 3-2 vote resolving to execute the agreement. By now a number of stormy monthly Town Board meetings had set opponents against long-time acquaintances on the Board, severely polarizing families and friends in the town.

⁶¹ The account in the remainder of this paragraph is drawn from the lengthy "Findings of Facts" in *Concerned Citizens of Cattaraugus County, Inc. v. Town Board of the Town of Farmersville*, Nos. 548765, 56036, slip op. (Cattaraugus Co.1994) (Sprague, J.), finding against the petitioners' challenge to the Town's 1991 enactment. The 1991 enactment is discussed immediately below. For subsequent case history see *infra* note 64.

C. The Farmersville Town Board's Relationship with IWS

The Farmersville Town Board appeared initially to be enticed by the prospect of unheard-of revenues provided by a landfill, and the town's attorney was equally enticed by the favorable personal prospects the proposal provided.⁶² However, once it entered into negotiations with the developer, the Town Board found itself over-powered and out-maneuvered and most unhappy with the dramatic loss of control over its own destiny that resulted from its initial decision.

In response to growing opposition following the first news of the IWS proposal in 1990, at its monthly meetings the Town Board told Farmersville residents it was preparing a landfill ban law. This led the Town Clerk to unearth the 1953 landfill law, which in turn precipitated the first IWS lawsuit. The 3-2 vote in favor of cooperating with the landfill developer the following year reflected a division over whether financial benefits outweighed costs to the community of hosting a commercial dump. This division would remain with the board on all subsequent issues regarding the landfill. The Town's 1991 contract with IWS provided for royalties of 3 percent on IWS's per-ton waste receipts as well as a new, more permissive local solid waste law.

Although the Board's misgivings about the landfill proposal steadily grew, as a result of its experience being sued the Town Board came to believe that it was trapped in its relationship with the developer. The Board therefore remained steadfast (though ambivalent) in its role as landfill host. Since the agreement, the Town Board has been reluctant to take any action to remove itself from the contract.

IWS retained a young woman who would live in Farmersville, act as the company's spokesperson (and eyes and ears) at Town Board meetings, and who cultivated a small-town, unprepossessed demeanor that seemed to win the admiration of some of the Board members and

⁶² See *infra* note 91.

a few Farmersville residents. The frustration that the Board's reticence and the IWS spokesperson's persistent presence caused landfill opponents at Town Board meetings led to open anger and accusations of conspiracy among Town Board members and the Town's attorney and the landfill developer. As a result, no real exchange between the parties ever took place at these meetings. The Town Board was never dislodged from its defensive position.

D. The Concerned Citizens Group

In the summer of 1991 Farmersville and Franklinville residents formed Concerned Citizens of Cattaraugus County (CCCC) to organize their opposition to the landfill proposal. Although prominent citizens from Olean and elsewhere in the county soon joined the group, the people who live close to Farmersville have formed the core of the active membership. The group has also been consistently supported by a handful of local clergy, sportsmen, and professors from the local university, a number of whom have taken a high profile in speaking out against the landfill proposal. These included members of the Olean Task Force, the Olean-based environmental group that had sought to intervene early in Farmersville events. This group had a short-lived life, and its active members joined CCCC.

Soon after its formation, CCCC came under the leadership of Kathy Kellogg, a native of Farmersville. Kellogg had been working as a newspaper reporter in Durango, Colorado, and had intended to return home for a brief period in response to her father's concerns about the landfill proposal. However, she soon became enmeshed in the dispute and remains today the fulcrum of CCCC's efforts.

For two years from the time the landfill idea was announced Town Board meetings were stormy, with fuming members of CCCC denouncing Town Board members for destroying their community and acting behind closed doors contrary to the residents' wishes. A stoic and demur Town Supervisor consistently defended his Board against these verbal assaults by referring to the Town's precarious legal position.

The Supervisor's view found support not only in IWS's willingness to litigate, but in CCCC's as well. One of CCCC's first moves, in September, 1991, was to sue the Town Board and IWS for violations of the state Open Meetings Law and for failure to review the agreement with IWS for environmental impacts as mandated by state law.⁶³ This lawsuit dragged on until its unsuccessful conclusion in 1996.⁶⁴

Notwithstanding the angry assertiveness exhibited at Town Board meetings, CCCC boosted its credibility with the wider local public by renouncing civil disobedience, a tactic that had been adopted in neighboring Allegany County to shut down a waste incinerator and to stop a state low-level nuclear waste disposal siting commission.⁶⁵ Outside Farmersville CCCC's work took place

⁶³ See *supra* note 61. Under SEQRA, *supra* note 18, "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions" require an agency to take a "hard look" at the relevant areas of environmental concern and make a "reasoned elaboration" of the basis of its determination whether such activities will have a significant impact on the environment. [1996] 6 N.Y.C.R.R. 617.2(b)(2); *Jackson v. New York State Urban Devel. Corp.*, 503 N.Y.S.2d 298 (N.Y. 1986) (citations omitted). This provision of the state regulations implementing SEQRA is unchanged from that in effect in 1991. New York's Open Meetings Law, PUBLIC OFFICERS LAW § 100-111, applies to "[e]very meeting of a public body," *id.* § 103(a), and is intended to promote "the performance of public business in an open and public manner, with the public able to attend and listen to the deliberations and decisions that go into the making of public policy." *Matter of Sciolino v. Ryan*, 81 A.D.2d 475, 477 (4th Dept. 1980). However, the power to declare any action taken in violation of the Open Meetings Law is given by the statute to the court's "discretion." PUBLIC OFFICERS LAW, § 107.

⁶⁴ *Concerned Citizens of Cattaraugus County, Inc. v. Town Board of the Town of Farmersville*, 221 A.D.2d 1010 (4th Dept. 1995), appeal denied, 87 N.Y.2d 809 (1996) (affirming dismissal of claims and declaration of validity of Town's contract with IWS).

⁶⁵ A good synopsis of the resistance to a low-level nuclear waste site in Allegany County in 1989 and 1990, put in the context of rural resistance to landfills serving extra-local needs in Western New York, is Fitchen, *Waste Disposal: LLRW and Other LULUs*, in *ENDANGERED SPACES, ENDURING PLACES*, *supra* note 1, at 226.

primarily on two closely linked fronts. First, CCCC sought to increase its membership and thus those who would vocally oppose the landfill proposal before the Farmersville Town Board and other local and state representatives, or provide steady financial support for CCCC's fight. Second, CCCC undertook and disseminated the results of a prodigious amount of research. This information campaign was important for attracting support and membership. But CCCC activists increasingly saw the organization's main purpose as preparing the grounds for a formal challenge to the landfill proposal within the procedures provided by the state permitting process.

In the beginning, however, almost all of CCCC's efforts went to getting the word out that a merchant landfill in Farmersville would be the largest threat ever faced by the county community. With a regular newsletter, mass mailings to rural mailboxes, and numerous well-crafted informational flyers, bake sales and raffles, talks to school and civic groups, invited editorials in local papers, radio talk shows, and even a debate with IWS's local representative broadcast on the local community cable television channel, CCCC provided steady contact with and reliable information to the public.

Reverend Clark Perry of Franklinville and Reverend James Snodgrass of Olean regularly lent their pulpits to the message that the protection of clean water is a sacred duty. Perry and Snodgrass led a prayer vigil at the site of the proposed landfill with local residents and their children that was covered by a Buffalo television news program and local newspapers. In both churches a special prayer was developed asking for divine aid in the struggle to save the water from the threat posed by the proposed dump. Other local churches found a place in the sermon from time to time for the Farmersville landfill question. The Buffalo-based Western New York Presbytery adopted an important policy statement supporting the protection of water in Cattaraugus County and providing substantial funding for CCCC's fight against the dump.

After hearing a talk by CCCC members an Olean High School government class became interested in the issue, researched it, and then planned a creative strategy of their own whereby each student prepared a letter to the editor to the Olean *Times Herald* focused

respectively on one specific issue raised by the landfill proposal. The paper devoted an entire page of a Sunday edition to the students' letters, which were so numerous as to spill over to the weekday editions. Each letter was well-crafted and persuasive. Together these CCCC-inspired actions brought all but a small vocal group in Farmersville over to the opposition against the dump.

Partly to attract as wide a following as possible outside Farmersville, and partly to support an argument for standing in the foreseeable environmental impact review of the landfill proposal, CCCC adopted an "environmental" statement of purpose:

To assure Cattaraugus County's air, soil, water and environment is clean and healthful, and to advocate with the public and governments that policies be implemented and that laws be passed to assure such a clean and healthful environment; to assure that local, state and federal environmental protection laws are enforced; to encourage skills for citizen advocacy for a clean and healthful environment.⁶⁶

Notwithstanding its environmental mission statement, the group's leader Kathy Kellogg expressed frustration with the "big ten" environmental organizations, such as the Sierra Club and the World Wildlife Foundation, to whom she initially went for assistance. Trying to get help from them, she said, "is like trying to lobby [then-]Gov. Cuomo -- it's hard to get their attention."⁶⁷

⁶⁶ From CCCC'S incorporation papers, Nov. 25, 1991; repr. in PROFILE: CONCERNED CITIZENS OF CATTARAUGUS COUNTY, INC., n.d. (1993 flyer).

⁶⁷ See Paul McClennan, *Grass-Roots Militancy is Answer to Hometown Problems*, BUFFALO NEWS, April 25, 1993, p. 9: "Kathy Kellogg of the Concerned Citizens of Cattaraugus County, recently honored [by the Albany-based Citizens Environmental Coalition] for fighting the Farmersville landfill, says that getting help from the Big 10 'is like trying to lobby Gov. Cuomo -- it's hard to get their attention.'"

Kellogg's growing ambivalence about the national environmental movement reflects the antagonism of many CCCC members toward the environmentalism of organizations sharing the outlook of the "Big 10." In a rural county with a high poverty rate, a citizens environmental group must overcome local class antagonism toward environmentalism, which is generally seen as an intellectual, middle class and national political movement. Because the active membership in CCCC came from the working class, including the working poor,⁶⁸ such antagonism has regularly manifested itself from within the group.

Kellogg's success as a leader is rooted in both her identification with and ability to express the thoughts and feelings of CCCC's active membership and her tactical alliance with and ability to speak the language of intellectual environmentalism. No one else willing to take a leadership role in CCCC has had this combination of abilities. This combination allowed Kellogg to overcome the diminished cultural capital of most of CCCC's core members, reflected above all in their limited articulateness compared to governmental officials and attorneys, and to enjoy immunity from the core member's disdain for those who bear the style of formal education and formal procedures, a style often accompanying those who impose extra-local sources of power and authority over local affairs.

In contrast to the national and international environmental movement, CCCC has understood its purpose to be protecting local water and land resources and "the local way of life" rather than unvarnished environmentalism. From the beginning the themes CCCC sounded, and for which they succeeded in achieving a positive reception throughout the county, have had to do with the preservation of community character and public health.

⁶⁸ The use of economic descriptives to name classes is unavoidable and unfortunate. I am attempting to describe valuational, behavioral, and cultural differences that are inextricably entwined with economic class. I assume that social class is a complex admixture of these factors.

E. Other Local Municipalities

In the summer of 1990 the mayor of the Village of Franklinville requested an environmental assessment of the landfill proposal from the Cattaraugus County Health Department. The Health Department's report, released on October 1, 1990, concluded that because it is connected to the Ischua Creek aquifer, and because a creek and wetlands alongside the proposed dump site supply the surface waters of the Ischua Creek, both connected to local drinking water supplies, the proposed landfill site is "unsuitable to insure that loss of contaminant containment would not have a severe, negative impact on the region's public and private water supplies and area water resources."⁶⁹ Soon thereafter the County strengthened its solid waste disposal law.

In March, 1992, the County Health Department completed a more detailed assessment of likely impacts of the proposed landfill's impacts on area water resources which confirmed its 1990 conclusions. This time, however, the County Health Department had the benefit of IWS's 1991 hydrogeological investigation plan, including preliminary test borings to determine the character of groundwater flows, and an independent study of hydrogeologic impacts commissioned by CCCC. The Health Department's 1992 study noted conflicts between the two studies relevant to determining the direction of groundwater flow, and relied partly on the CCCC study to find that "[s]everal springs are known to occur on and around the site" discharging into the Ischua Creek.⁷⁰ Noting that municipal wells for the nearby Village of Franklinville and Town of Hinsdale

⁶⁹ Quoted in Mary T. Robbins, *Farmersville Landfill Site Criticized in County Health Report*, TIMES HERALD, Oct. 1, 1990, p. 2.

⁷⁰ CATTARAUGUS COUNTY DEPARTMENT OF HEALTH, ENVIRONMENTAL ASSESSMENT OF THE PROPOSED LANDFILL IN THE TOWN OF FARMERSVILLE, CATTARAUGUS COUNTY, N.Y., ON AREA WATER RESOURCES, 15 (March 11, 1992) (referring to AFI, HYDROGEOLOGIC INVESTIGATION PLAN (July, 1991) (for IWS) and EARTH DIMENSIONS, INC., A REVIEW OF THE AVAILABLE GEOLOGIC, HYDROGEOLOGIC, AND SOILS DATA REGARDING THE PROPOSED SOUTHERN TIER SANITARY FACILITY (Feb. 21, 1992) (for CCCC)).

“may be in hydrologic communication with Ischua Creek” and that “[t]he City of Olean utilizes Olean Creek [into which Ischua Creek discharges] to provide a significant percentage of its daily water needs,” the Health Department assessment concluded that “the proposed landfill site may not be suitable to preclude contamination of the area’s water resources.”⁷¹ The assessment struck an optimistic tone nevertheless by noting that under the state’s environmental review procedures the Health Department “is classified as an ‘interest agency’ and, as such will be able to review data and provide comments throughout the siting process.”⁷²

The City of Olean financed its own independent study of the impacts of the proposed landfill that was also completed in March, 1992. This study found that the likelihood of contamination to Olean’s drinking water sources as a result of the proposed project “pose[s] an unacceptable risk.”⁷³ This conclusion assumed that during the life of the landfill an “uncontrolled release” would occur,⁷⁴ and was based on a finding that “the travel time via surface water path from the landfill to the city would be on the order of days to weeks, not [as with groundwater flow] years.”⁷⁵ The City’s study also noted that because the proposed landfill site is located within a “public water supply wellhead area[]” the site violates a state siting prohibition.⁷⁶ Nevertheless, the study assured the City that ample

⁷¹ *Id.* at 23.

⁷² *Id.*

⁷³ Report of March 19, 1992 from Golder Associates to Peter Marcus, Department of Public Works, City of Olean, *Review of Hydrologic Conditions, Proposed Landfill – Integrated Waste Systems, Farmersville, New York*, 10.

⁷⁴ *Id.*

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 2. This statement was, however, “based on a cursory review of the regulations.” *Id.* (citing 6 N.Y.C.R.R. Part 360-2.12(c)(1)(i) (“no new landfill . . . may be constructed over primary water supply aquifers, principal aquifers, [or] within a public water supply stabilized cone of depression area . . .”)).

opportunities would, under the regulations, be provided for participation in the environmental review of the landfill proposal.⁷⁷

By mid-1992 the County, the Village of Franklinville, and the City of Olean each passed formal resolutions opposing the landfill proposal. In January, 1993, the County hired a prominent environmental attorney to represent it in the DEC permit proceedings. The County also established the Farmersville Task Force to advise the legislature regarding its policy and progress in the proceedings on a continuing basis. In addition to legislators and representatives from county public works and planning agencies, and from the Farmersville Town Board, two and later three members of CCCC's Board of Directors were named to the Task Force.⁷⁸

To the Task Force as well as to key state legislators CCCC quietly provided research on local hydrogeology, wetlands areas, and protected plant species at the proposed dump site that might trigger state siting prohibitions. It used its own commissioned study, a

⁷⁷ At the time of this report a public comment period on the scope of IWS's future draft EIS (DEIS) was open. Golder therefore reported to the City:

The DEIS will presumably address each of the issues or questions identified in the public scoping [meeting, which occurred on January 7, 1992]. Review of the DEIS represents the second opportunity for the public to comment and participate in the conceptual review phase of the permit process. Comments on the the adequacy of the DEIS, including how well it presents the evaluation of impacts, means of mitigating such impacts, and possible alternatives, will be included in the topics for comment. The site-selection methodology and hydrogeologic investigation will also be subject to comment. The DEC may also schedule a public hearing as part of the DEIS review. The public hearing is a procedure to resolve disputed issues of fact or to record substantive issues related to existing data or a DEC position. The results of the public hearing will be used by the DEC to aid in a final decision on the conceptual review.

Id. at 3.

⁷⁸ See *Legislature Creates Task Force to Study Landfill Permit Process*, TIMES HERALD, Jan. 28, 1993, p. 2.

second wetlands and species study of the site it commissioned, the studies referred to above completed by or for the County and the City of Olean, and its own critical reading of successive versions of IWS's draft EIS. CCCC also provided to local officials background on IWS and its officers and affiliates it hoped would support a "bad actor" investigation by the DEC. Maurice Hinchey's 1992 letter to DEC Commissioner Jorling was one result of this work.⁷⁹ Because it was subsequently widely disseminated by CCCC, Hinchey's letter had a significant impact on local public opinion.

Since its inception the county legislature's Farmersville Task Force has consistently opposed the landfill proposal on planning, public health, and economic grounds. The likelihood of adverse impacts on tourism and on the success of an approved county waste management plan are the most often cited reasons given for its opposition by the Task Force. Bringing in over 2 million tourists who spend approximately \$1.5 million annually, tourism is the county's largest industry.⁸⁰

F. The New York State DEC

The DEC took a dual role in the dispute. On the one side, DEC Staff scrutinized the results of research performed by IWS for compliance with state regulations. On the other side, an Administrative Law Judge (ALJ) from within the DEC adjudicated the relevant issues on which approval of IWS's state permit application would depend.

Staff from the DEC's Division of Regulatory Affairs held a two-day "scoping" meeting on March 18 and 19, 1992, to determine what issues should be addressed by IWS's preliminary environmental impact statement. Possible issues were restricted to what could be deemed by the DEC necessary to approve the landfill proposal "conceptually." A regular permit application would follow once IWS

⁷⁹ Cf. *supra* note 55.

⁸⁰ See Rick Miller, *Task Force Scrutinizes County Landfill Policies*, TIMES HERALD, Oct. 8, 1993, p. 2.

passed this preliminary phase of "conceptual review."⁸¹ About 800 people attended the meeting to voice their concerns regarding groundwater protection, truck traffic, economic impacts, and community identity. Except for the "hard science" issues, ultimately few of these concerns were meaningfully included in the scope of research DEC asked of IWS.

DEC Staff also oversaw IWS's completion of an environmental impact statement (EIS) required under conceptual review. DEC's role in this regard included significant technical assistance provided to the applicant but denied to all other parties. DEC Staff performed no independent research of its own in Cattaraugus County. Rather, it reviewed the analysis of the data provided by IWS for consistency with methods of analysis agreed upon by the two parties in the course of developing a complete EIS. DEC Staff did not question the veracity of the raw data provided by IWS for its analysis.⁸²

A procedure for acquiring public access to official DEC notices and DEC correspondence with formally recognized parties to the permit proceedings was established in March, 1992, whereby such materials would be deposited by the DEC in the Olean Public Library. The correspondence⁸³ shows the DEC arranged a number of work

⁸¹ Regarding the distinction between conceptual review and permit review procedures, see *infra*, notes 85 and 90.

⁸² The post-issues conference (Sept. 22, 1994) submission, *Position Statement of the Department Staff on IWS Issues* (n.d., on file with the author), p. 16, states: "Based on the information supplied to DEC by consultants to IWS as well as independent DEC analysis of raw data, it was determined that the area of the Carpenter Brook Valley Aquifer downgradient of the proposed landfill footprint could not be defined as a Principal Aquifer." There is no indication that DEC Staff collected any of the "raw data" referred to.

⁸³ In addition to those documents deposited in the library file referred to in the text, *supra*, a May 14, 1993 Freedom of Information Law (FOIL) request from CCCC to the DEC for additional materials under the March 1992 agreement returned 61 additional documents. 26 of these provided technical guidance to IWS, and the rest were responses to parties regarding the timetable for the review process or regarding information provided to the DEC against the IWS proposal (21 to state and local political representatives and agency officers, 8 to CCCC, 4 to the Town

sessions with IWS's attorneys, engineers, and hydrogeologists. By far the majority of the correspondence was from DEC to IWS, and most of this served to shepherd IWS's application through the procedures, clarifying the regulatory requirements for approval. DEC Staff's assistance included specifying methodologies for technical analysis of empirical data IWS would have to provide to pass muster under the regulations. However, notwithstanding the procedure for providing public access to such documents, the DEC withheld a number of such documents regarding methods of analysis, making it difficult if not impossible for opponents to criticize assertions or assumptions made by IWS regarding the data supporting its application. Moreover, well in advance of DEC's certification that IWS's application for conceptual review was complete, DEC included the IWS proposal on a state-wide list of nine "high priority projects," indicating the agency was predisposed to support the proposed project.⁸⁴

Public officials and concerned citizens who followed the administrative review process closely believed that the DEC was an interested party on the side of IWS. This perception arose partly from their misunderstanding of the roles played, respectively, by the ALJ and DEC Staff. Although both were employed by the DEC, DEC Staff provided a recommendation as to the merits of the developer's efforts to meet state siting requirements, in its role as a formal party to the proceedings while the ALJ sat between proponents and opponents as a neutral arbiter on the issues. The ALJ would

of Farmersville, 3 inter-governmental state agency communications). CCCC subsequently submitted additional FOIL requests because these documents were incomplete, but no new documents were returned. See generally Gerrard, *supra* note 30.

⁸⁴ October 19, 1993 Memorandum of DEC Division of Regulatory Affairs (designating high priority projects pursuant to DEC O&D [Organization and Delegation] Memo 91-09, "Permitting Priorities") (on file with the author). Most of the other nine projects were landfills located in Western New York. This confidential document was made available to CCCC in late 1995. It should be noted that at no time during the events discussed in this Article was an application for a permit to operate a landfill in Farmersville under consideration. *Cf. infra*, notes 85-89.

ultimately decide what issues would be adjudicable in the conceptual review proceedings and would adjudicate those issues. Nevertheless, knowing that DEC Staff were providing technical assistance to the applicant *and* sat on one side of the table at the adjudicatory hearing recommending to the ALJ approval of the applicant's proposal created the appearance of a conflict of interest within the DEC regarding the dispute that frustrated and galvanized all the parties in opposition.

The local perception that the degree of support to IWS provided by the DEC reflected the agency's bias for the landfill also arose partly from the contrast between conceptual review and permit review. The bifurcated review procedure, designed to review first whether the state's siting prohibitions should be invoked, then whether specific provisions proposed for construction and operation are adequate,⁸⁵ was also not well understood by the public. Once successfully over the hurdle of conceptual approval, IWS still had to

⁸⁵ Conceptual review allows the DEC to determine whether the "concept" of the landfill is worthy to go forward to the permit application stage. A favorable decision on conceptual review leaves open questions regarding the details of how the facility would be engineered and the "mitigations" the developer should implement, but fundamental siting questions will not be revisited. "Such a decision is intended to provide the potential applicant with a binding decision from the Department as to the general acceptability of a proposed project, or any component or issue specified, the standards of which will be applied to the project and desirable design standards." *In the Matter of the Applications of Integrated Waste Systems, Inc., Rulings of the Administrative Law Judge on Party Status and Issues*, DEC Project No. 9-0438-00004-00003-9 (Dec. 6, 1994), 2. See also *In the Matter of the Application for a Conceptual Review, Interim Decision of the Commissioner* (same Project No.), 1995 N.Y. ENV LEXIS 5 (March 4, 1995); *Decision of the Commissioner* (same Project No.), 1996 N.Y. ENV LEXIS 11 (May 15, 1996), 4. Cf. also *infra* note 90.

submit a complete permit application.⁸⁶ The concerned public, however, tended to view the conceptual review process as a final determination as to whether the landfill would be permitted.

G. CCCC's Changing Relationship with the Farmersville Town Board

By the end of 1991 the Farmersville Town Board had already suffered three separate attacks through the courts and had resolved to cooperate with the developer's plans. As part of the agreement it reached with the company, IWS paid a \$75,000 "filing fee" to the Town and agreed to pay the costs of independent review of its proposal by an engineering firm retained by the Town. While it was intended to cover the costs of the Town's participation in the state environmental review process, the filing fee was soon consumed by legal defense of the Town in a civil action.⁸⁷

CCCC's decision to take its dispute with the Town Board into court had the benefit of the public support it had carefully cultivated. However, it did not enjoy the support of the courts. Two and one-half years later, in February, 1994, the court upheld the freedom of the developer to pursue its economic interests against acknowledged violations of open government laws and, in 1996, an appeal failed on the issue of whether the Town, by prematurely permitting a dump whose precise nature was yet to be determined, could bargain away the powers of future town boards to review the landfill proposal.⁸⁸

⁸⁶ As discussed below (Section IV), conceptual approval was granted by the DEC in 1996. As of this writing (September 15, 1999), however, IWS's permit application has yet to be accepted as complete by the DEC. When an application is accepted as complete IWS will be required to prepare a second, supplemental EIS including within its scope detailed engineering plans and the full range of impacts mandated under New York's expansive definition of "environment." See *supra* note 53.

⁸⁷ Cf. *infra* note 90.

⁸⁸ *Supra* note 64.

Late in 1991, CCCC's original attorney, who was fresh out of law school, left the area, abandoning some \$40,000 in debt the citizens group had incurred for his services. For no fee, the Environmental Policy Clinic of the State University at Buffalo School of Law then took the group as a client. Although it was unsuccessful in taking over CCCC's suit against the Town and IWS, the Clinic represented CCCC successfully in an application for party status in the state review proceedings. Although within the administrative review context party status turned out to be largely symbolic, within the group and in the local context party status enhanced CCCC's social and political standing.

Engineering reviews of the IWS proposal commissioned independently by the Town of Farmersville with monies provided by IWS under its contract with the Town, completed in the summers of 1993 and 1994, confirmed the fears of the other parties in opposition that off-site contamination to area drinking water supplies is likely to result from operation of the landfill. This strengthened the Town's resolve to declare its opposition during the 1994 adjudicatory hearings on state conceptual review of the proposal. Formal opposition within the state review proceedings, however, was all the Town had left; under its contract with IWS the Town had given up the strong home rule powers provided it under New York state law.⁸⁹

During this time CCCC insisted the Farmersville Town Board make full use of the contract provision requiring IWS to pay for all costs the Town incurred in reviewing the proposal as an independent party to the state review process. This allowed CCCC to call into question the reliability of IWS as a contract partner with the Town when such payments were not made. The group was able to discredit IWS indirectly, by making regular Freedom of Information requests for documents from the Town Clerk, who proved to be cooperative, and by maintaining a regular active presence at monthly Town Board meetings to ask when IWS's payments would be made. CCCC thus helped alienate the Town Board members from their contract partner.

⁸⁹

Cf. supra note 27 (discussing home rule under New York law).

This paid off when the time came for adjudicatory hearings because the Town's special engineers, expenses for which IWS was reimbursing the Town, provided additional expert testimony at the Town Board's urging as to the questionability of the proposal. While the added expert testimony against the proposal proved unavailing, town voters' disenchantment with the contract helped put two members of CCCC's directors on the Town Board in the 1995 elections and thereafter helped move the Town Board further toward open opposition.

IV. The DEC Proceedings

Much has already been said about the initial phase of the Farmersville dispute. Belief in the strong likelihood that the Farmersville landfill will significantly compromise community character, public health, and the local economy mobilized surrounding municipalities. Citizens and their local political representatives joined in a consensus that without such mobilization these local concerns would be disregarded by the state. Community mobilization from 1990 to 1995, when formal hearings on the landfill proposal were held by the DEC, was therefore designed to inject these concerns into the formal review process. Those who participated in this effort at all levels in Cattaraugus County believed that a strong showing of community opposition would add to the persuasiveness of evidence and arguments directed to the formal elements of the law of environmental protection. But it was the objective evidence and arguments, they thought, that would ultimately stop the dump. When this optimism smashed against the procedural burdens and extra-local policy of the DEC proceedings, the local parties to the dispute were forced to radically alter their view of the law.

With the Town's contract providing it the guarantee of a future local permit, IWS turned to the preparation of a state-mandated EIS. In April, 1991, IWS elected under a new procedural option to submit an application to the DEC for "conceptual review" rather than for a full-blown state permit to construct and operate a landfill. By doing so the company hoped to enjoy the relaxed scrutiny provided under

this procedure for most of its 4,000-page EIS, as well as the restricted scope of review of its future permit application that would result from conceptual approval. However, instead of streamlining the permit process (the purpose envisaged in state regulations),⁹⁰ conceptual approval was granted only in the spring of 1996. In the interim over 800 members of the public attended the DEC's two-day scoping meeting (in March, 1992), and the DEC rejected IWS's draft EIS twice (January, 1993; October, 1993), extended the deadline for public comments on the final EIS to June 28, 1994, and only then assigned an ALJ to determine who would be formal parties to the proceedings. The ALJ presided over three separate hearings under conceptual review: a Legislative Hearing, Issues Conference, and an Adjudicatory Hearing. By the time of the adjudicatory hearing in August, 1995, IWS testified the company had spent over \$7 million on the project, most of it on experts and attorneys' costs.⁹¹ DEC Staff testified at the adjudicatory hearing in favor of the landfill proposal.

⁹⁰ See *In the Matter of the Applications of Integrated Waste Systems, Inc., Position Statement of the Department Staff*, 2, n.d. (quoting DEC Organization & Delegation Memo #90-39 (Dec. 3, 1990) (conceptual review is intended "to enable early executive decisions on the acceptability of siting efforts by project sponsors before they must invest substantial time and money in long-term site monitoring and characterization, as well as facility design.")) (on file with author).

⁹¹ By this time, the tiny Town of Farmersville spent over \$100,000 to pay its own attorney for services arising from the landfill agreement. See Division of Municipal Affairs, Comptroller of the State of New York, TOWN OF FARMERSVILLE: REPORT OF EXAMINATION, 97M-246 (audit) (September 26, 1997) <<http://www.osc.state.ny.us/localgov/>>, p. 9 ("Since the date the agreement went into effect [September 1991] through the end of the 1995 fiscal year, the town paid over and above the amounts received from the contractor [a \$75,000 filing fee], more than \$47,000 to the town attorney for legal services"). The county spent a comparable amount to participate in the DEC proceedings.

Notwithstanding the difficulties that both the County⁹² and CCCC experienced obtaining information about DEC's deliberations, the DEC proceedings gave the appearance of ample opportunity for public participation in its review of the landfill proposal. The 1992 scoping meeting for which some 800 citizens turned out has been mentioned. Much later Kathy Kellogg characterized the subsequent opportunities for public participation:

It took 2 years for IWS to write an acceptable scoping document . . . ; then it took almost 2 years to prepare the DEIS and another 60 days for public comments; then the public [comment] hearing and issues conference and almost another year for an adjudicatory hearing [in late summer, 1995], then six months for a final decision [on conceptual review].⁹³

These opportunities for public participation buoyed opponents' hope that their efforts would have the effect that, in their minds, was envisaged by the formal procedures of administrative review. They hoped, that is, for a meaningful consideration of evidence that provided the basis for overwhelming community opposition to the landfill proposal.

On September 24, 1994, the ALJ presided over a two-part Legislative Hearing (or "Public Statement Hearing") designed to allow the public to voice their views on the proposal, in the afternoon

⁹² As a formal party to the proceedings, Cattaraugus County was joined with the City of Olean. However, Olean provided no financial contribution to the substantial attorney's fees incurred by the County and otherwise participated minimally in the proceedings. Moreover, CCCC worked closely with county officials and county political representatives and with the County's attorney, but not with officials and representatives of the City of Olean. By 1995 the main parties in opposition were clearly CCCC and the County. Therefore, in what follows the party named in the documents generated by the DEC proceedings as the "County/City of Olean" will be called simply the County.

⁹³ Letter from Kathy Kellogg to CCCC Board members, October 31, 1996 (on file with author).

and the evening. About 500 people attended, 70 of whom made statements from a microphone, in a large fire hall in Franklinville, overwhelmingly opposed to the proposed landfill. To these statements, offered by local politicians, clergy, agency officials, attorneys, and concerned citizens, the ALJ refused to respond substantively. Often a speaker would ask pointedly why the DEC was so unresponsive to local concerns, and why the ALJ in particular seemed so unmoved by the heartfelt concerns of reasonable people. Occasionally the ALJ explained to such a speaker that the purpose of the "hearing" was only to provide an opportunity for public comment. This opportunity was in addition to the earlier opportunity to submit written comments on the final EIS, from January 20 to June 28, 1994, to which 37 citizens responded, also almost all in opposition.

During the Public Statement Hearing Roger Bennett, the white-haired President of IWS, sat in the corner at the front of the large fire hall, steeley-eyed and occasionally glaring at a speaker. In his tan three-piece suit he stood out from everyone else in the room. Even the attorneys and the ALJ, in their dark three-piece suits, appeared in contrast to Bennett. The ALJ's stenographer took down every word in her smart suit, unflinching and unemotional. Everyone else was dressed informally, men in overalls and flannel shirts or tee-shirts, work boots or tennis shoes, women in slacks or shorts, loafers or sandals, a few in light summer dresses. A few of the most animated speakers turned directly to Bennett from their place at the center front of the room to denounce him and his company for destroying the community.

The following day the ALJ held an "Issues Conference." The purpose of this proceeding was to determine who would be formally accepted as parties to the subsequent proceedings and what issues would later be "adjudicated." Attorneys representing IWS, DEC Staff, the Town of Farmersville, Cattaraugus County, and CCCC participated, as did an anthropology professor representing a group of "Concerned Professionals," including clergy, opposing the project, and a representative of the "Southtowns Homeowners Association,"

purportedly speaking for Buffalo's south suburbs to the north of Farmersville. The Conference began at 9:00 A.M. and, after a lunch break, ended shortly after 5:00 P.M.

Although the bulk of written public comments submitted by the County, the Town of Farmersville, CCCC and other members of the public offered to prove that impacts of the proposed dump on community character, truck traffic, and drinking water sources for downstream communities should preclude conceptual approval of IWS's proposal, the ALJ ultimately reduced the adjudicable issues to three: whether the stability of the slope at the site could sustain a landfill of the size proposed, whether impacts on a threatened plant species found at the site could be mitigated, and whether a "primary" or drinking-water-source aquifer was located directly beneath the site. The third question went to the risk to downstream drinking water supplies which most local people believe is the most important question. This issue was, however, limited to exclude the question whether surface water at the site, including springs and surface runoff, recharges downstream surface waters, both of which provide drinking water supplies. The issue was specifically defined as whether the capacity of the aquifer underlying the site was great enough to meet the regulatory definition of a "primary aquifer," determined by on-site test well yields, and whether this aquifer is hydrogeologically connected to the undisputed primary aquifer underlying the Ischua Valley, based on off-site test borings and historical data.

An adjudicatory hearing on these three issues took place in 1995. The way the issues were defined restricted the scope of the adjudicatory hearing to scientific matters in the narrowest sense. Accordingly, the hearing revolved around the testimony of hydrogeologists and engineers. The issues with which the citizens group and the County were most concerned, impacts on community character and downstream water resources, were ruled irrelevant whenever raised, as they were by the County's attorney and expert hydrogeologist and the Town of Farmersville's expert consultants. The ALJ's ruling that the Concerned Professionals and the Southtowns Homeowners Association lack standing and therefore

would be denied party status seemed to foreshadow the priority that would be given to a technical approach to questions raised in the hearing. Reduced to a dispute over what science could determine with reasonable certainty and whether engineering could "mitigate" known or knowable adverse physical impacts, the adjudicatory hearing appeared to focus on levels of risk that remained vague and undefined to the observing public.

The exclusion from the hearing of reasonable evaluation of as yet unknown or unknowable risks, articulated by many speakers at the scoping session and by representatives of party opponents at the issues conference, remained mostly unstated by the ALJ but obvious to the observing public. However, at one point in the adjudicatory hearing this otherwise unstated principle was openly acknowledged in a way that drew gasps from local observers. In response to pointed questioning from the County's attorney regarding the likelihood of slope failure at the Farmersville site, a DEC Staff engineer testified at the adjudicatory hearing that with enough money a developer could construct a landfill anywhere.

Also unstated during the days of testimony by hydrogeology and engineering experts at the scoping meeting, the issues conference, and the adjudicatory hearing was the state's interest in the public benefit of adequate state-wide landfill capacity. It was this benefit, only tenuously linked to the place where the landfill might be located, which would be weighed against any unmitigated known risks.

In preparation for the 1995 adjudicatory hearing, CCCC undertook with its own volunteers a massive survey of well water users in the vicinity of the proposed landfill site to show that the groundwater table was too high to meet regulatory siting criteria, and that the volume of water in the underlying aquifer was large enough to trigger a regulatory landfill siting prohibition. Testimony from local well drillers with decades of experience exploring the water table and groundwater flows in the area was also collected. The attorney for the County, with whom CCCC and its attorney worked closely, encouraged the organization to collect the well data. The data provided by this study was far beyond the scope of research on area water wells completed by IWS. CCCC collected the information in

the belief that it could show that IWS had performed incomplete or shoddy research, and in the hope that CCCC's research might be accepted on a par with that submitted on the same issue by IWS.

New York's Environmental Conservation Law requires a landfill developer to show that its proposal fulfills a market need.⁹⁴ This issue was addressed in CCCC's submitted comments, showing falling tipping fees in the region (due in part to a concentration of landfills in Western New York) and in submitted comments from Cattaraugus County and the City of Olean, showing the County's approved Solid Waste Management Plan made the proposed landfill unnecessary, and quoting the New York State Solid Waste Management Board 1994 report stating, "if the State's 50% reduction/reuse/recycling goal were achieved by 1997 [as planned] and waste flows freely to facilities that are underutilized, available in-state landfill capacity would essentially be sufficient to meet state disposal needs." However, these arguments were dismissed by the ALJ, who ruled that the question was adequately answered by the developer's own assertion that the project would be economically viable:

Here, the Applicant has submitted a proposal for a regional merchant-operated facility, drawing its waste stream from a 300 mile radius of the site. The Applicant's proposal goes far beyond the narrow focus of waste disposal solely within and only for Cattaraugus County. In fact, it is conceivable that the proposed facility might never be utilized for the

⁹⁴ Under SEQRA, *supra* note 18, an EIS on a landfill must balance the social and economic benefits of the proposal against the unmitigatable or unavoidable impacts. 6 N.Y.C.R.R. § 617.9(b)(5)(iii)(b). This issue "is separate from any regulatory requirements outlined in 6 N.Y.C.R.R. Part 360," landfill permit application procedures. *In the Matter of An application for permits to operate and construct a Construction and Demolition Debris (C&D) Landfill in the Town of East Greenbush, Rensselaer County by 4C's Development Corporation* (DEC Application No. 4-3824-00045/00001-0), Decision of the Deputy Commissioner, January 22, 1998, 1998 N.Y. ENV LEXIS 5, *68 (citations omitted).

disposal of wastes generated within Cattaraugus County. Moreover, the Applicant's proposal extends beyond the scope of New York State disposal capacity with its large interstate, even international wasteshed.

In this instance, it is sufficient for the Applicant to have determined that the proposed Project is necessary to meet its corporate goals and to satisfy its perception of a requirement for additional solid waste disposal capacity within its defined wasteshed in the foreseeable future.⁹⁵

Based on the ALJ's recommendations, in a May 15, 1996 Decision of the DEC Commissioner IWS was granted conceptual approval for its proposal.⁹⁶ This allows IWS to submit an application to the DEC for state permit approval.⁹⁷ Under its contract with the Town, a local permit will be granted automatically when IWS is granted a state permit. Since slope stability and proximity to a primary (drinking-water source) aquifer were "adjudicated" under the conceptual review portion of the state's review of the proposal, only the specifics of how IWS will engineer construction of the landfill remain at issue. Specific issues raised in the proceedings that remain to be adjudicated in a permit proceeding include how IWS will adequately mitigate the steep slope of the site and the proposed project's adverse impact on a stand of the threatened plant species Shrubby St. Johnswort.⁹⁸ However, since the site was found not to be situated directly over a primary aquifer,⁹⁹ off-site groundwater

⁹⁵ *Rulings* (Dec. 6, 1994), *supra* note 85, at 24, *aff'd Decision* (May 15, 1996), *supra* note 85, at 6.

⁹⁶ *Id.* at 1 (adopting and incorporating the ALJ's *Hearing Report* on the Project (n.d.) recommending conceptual approval for IWS's proposal).

⁹⁷ *Id.* at 6 ("Should the Applicant decide to pursue its plans to develop a solid waste management facility at the Farmersville location, it must now submit a complete application for a solid waste management facility pursuant to the current 6 N.Y.C.R.R. Part 360.").

⁹⁸ *Rulings*, *supra* note 85, at 20-24.

⁹⁹ *Id.* at 24.

impacts were found to be "slight" and subject to "prevention and mitigation measures regarding any potential leachate releases from the site," to be addressed in subsequent permit proceedings.¹⁰⁰ This means that the siting decision has been made in IWS's favor.

A. The Aftermath of the DEC Proceedings

Both CCCC and the County learned that advocating their interests in a dispute over the allowable issues in a state environmental proceeding is largely futile. Its only purpose is to delay the progress of the developer. Accordingly, while the County remains involved in the state review process, it is also looking for alternative lines of attack on the IWS proposal.

During the summer of 1996 Cattaraugus County legislators embarked on a plan to develop a county park on land at the proposed landfill site. An assessment completed in December established the need for a new park in the county. The County applied for and, with the help of local state political representatives, was awarded \$200,000 in January, 1997, toward the purchase of the land by the state's Office of Parks, Recreation and Historic Preservation.¹⁰¹ This money has been outmatched, however, by funds provided to IWS through the bonding power of the state's Environmental Facilities Corporation, a public authority under the direction of the state executive branch.¹⁰²

The county's "park plan" reflects their disenchantment with the state review process and a turn toward a more aggressive approach to the law. Their hope is that, if IWS refuses to sell the land

¹⁰⁰ *Id.* at 23.

¹⁰¹ Rick Miller, *County Gets Grant to Help Fight Landfill*, TIMES HERALD, Jan. 7, 1997, p. A1.

¹⁰² Rick Miller, *County Lawmakers Criticize Sate Official*, TIMES HERALD, July 18, 1995, p. A2 (reporting approval by Environmental Facilities Corp. for a \$28 million low-interest loan for IWS's Farmersville landfill proposal, and a resolution by the Cattaraugus County legislature requesting the authority rescind its approval).

to the county, it can be obtained by eminent domain.¹⁰³ Predictably, IWS brought suit against the county to enjoin its exercise of condemnation powers, but the lawsuit was dismissed in September, 1998, and there are no signs IWS will pursue it further.¹⁰⁴

The process of disenchantment with state environmental law fractured and wounded CCCC. By the time of the 1995 adjudicatory hearing the group's leader Kathy Kellogg was tiring. She devoted her life to the fight against the dump for four long years and was now without a job and unable to remain in her father's home. She gained many friends not only in the Franklinville and Farmersville area but beyond as a result of her work in the Citizens Environmental Coalition, which brought her to Albany as a lobbyist numerous times, and she cultivated an important relationship with Lois Gibbs at the Citizens Clearinghouse for Hazardous Waste outside Washington, D.C. Almost single-handedly Kellogg created the Western New York Garbage Coalition, a loose network of activists in towns and villages around the region experiencing many of the same effects of being targeted for a landfill site as had Farmersville and Cattaraugus County. In January of 1994 the Garbage Coalition held a well-covered press conference in Albany giving then-Governor Mario Cuomo low grades on a "Report Card" for his waste management policy. But none of this put any food on the table.

In 1994 Kellogg shared the leadership of CCCC with a local college professor who had been active in the group for two years. Although bringing a new level of articulateness to the group's cause, he was unable and unwilling to defer his social and domestic affairs to the cause in the degree Kellogg had. As a consequence, the group suffered from sporadic efforts at mobilization after the 1995 Hearings.

¹⁰³ Rick Miller, *New County Committee Formed to Buy Farmersville Land*, TIMES HERALD, Sept. 12, 1996, p. A-2; *Comments are Sought on Farmersville Park Plan*, TIMES HERALD, Dec. 2, 1996, p. A-2; Rick Jozwiak, *Study: Park Great Idea, but People Don't Want One*, TIMES HERALD, Dec. 4, 1996.

¹⁰⁴ Matt Anderson, *IWS' Suit Against County Dismissed*, SALAMANCA PRESS, Sept. 25, 1998, p. 1.

CCCC's fragmentation worsened in the nearly two years that followed owing partly to the fact that there was little to do within the framework of the DEC proceedings, since IWS delayed submitting its application for a permit, and partly to the fact that yet another, even less energetic man became the group's president in 1996. A Franklinville attorney who had recently moved to the area, he had become involved with the group one year earlier, while Kellogg removed herself more and more from the group's activities to find employment and housing. Only a few loyalists from the Franklinville-Farmersville area continued to actively inquire of Kellogg about progress in the fight. While membership monies continued to come in to the group, without regular distribution of the group's newsletter and regular public occasions to keep CCCC's message current, many supporters throughout the county began to think the fight was over, that the siting of the dump was a "done deal."

Fortunately, the County's plan to construct a park on the proposed dump site of the proposed landfill became a regular news item in 1996 and 1997. The park plan also resuscitated the Farmersville Task Force, bringing CCCC Board members and county agency officials and legislators together again. This coalition had to fend off the criticisms of a small group attending Task Force meetings who complained about the public expenditures the County's involvement required. At least two county legislators balked at the continued expenditures as well. But opposition to the landfill proposal had by then become an established element in county public policy, firmly supported by the county's Planning and Tourism Department, which had targeted the state highway running through Farmersville for tourist development some years prior to IWS's coming to town.¹⁰⁵ The ALJ's rejection of one of the County's major

¹⁰⁵ At the 1994 public legislative hearing County Legislature Chairman Richard Haberer testified orally that the 21 county legislators were unanimous in their opposition to the dump. (Notes on file with author).

arguments against the dump, that the project would be fatal to the county's longstanding planning efforts, only helped solidify this aspect of county public policy.

V. Conclusions

A. The Role of Legal Consciousness is Limited

The change in legal consciousness represented by the disenchantment of CCCC with law and the subsequent fragmentation of the organization, and by the County's adoption of a eminent domain approach to the siting dispute, should be seen as minor shifts in the instrumentalist approach to law with which all parties to the dispute began.

Instrumentalism is a native American approach to law. In the nineteenth century Alexis DeToqueville identified this facet of American culture:

[A]ll parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually permeates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and tastes of the judicial magistrate.¹⁰⁶

Because throughout western New York a number of landfill disputes have been joined and have developed as administrative law cases and, in some cases, civil law cases, many municipalities and citizens in the

¹⁰⁶ Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* (1993), 28n.23 (quoting Alexis de Toqueville, *DEMOCRACY IN AMERICA*, vol. 1, trans. Henry Reeve (1876), 358-59).

area are quite familiar with this sort of dispute. They expect the administrative adjudication of such disputes under the complicated and time-consuming procedures adopted by the DEC. They also expect that landfill developers will have a particular facility for using such procedures and that, as a result, in order to play a role in the outcome, they must too. Municipalities and citizens also learn quickly that commercial developers of landfills embrace litigation as a basic cost of doing business. Everyone begins with an instrumentalist approach to law.

The County's park plan represents an aggressive, even militant exercise of local governmental power exerted in response to the apparent brick wall of state administrative review and private capital resources working together to frustrate overwhelming local opposition to an unwanted land use.¹⁰⁷ The County's instrumentalist approach to legal aspects of the dispute has not changed, however. Indeed, a new commitment to using a different legal instrument to achieve victory in the dispute has emerged.

CCCC succeeded in directing the native instrumentalism of local opponents to environmental law standards. Standards for prohibiting the siting of a landfill under state law in New York are very specific as to depth to groundwater and proximity to a major aquifer. Since year-round running springs are scattered across the site, putting the groundwater level at the surface, and since surface waters and groundwater from the site recharges the Ischua Valley aquifer, CCCC was optimistic that regulatory standards would provide the basis for denying IWS a state permit. They therefore pursued all opportunities to participate in the DEC proceedings enthusiastically. Their optimism was bolstered by the public openness of these proceedings which, unlike the civil suit they brought against IWS and the Town of Farmersville, provided an opportunity for dramatic expressions of public discontent and colorful local press reporting of

¹⁰⁷ Compare Olsen, *Commercial Hazardous Waste Facilities*, *supra* note 30, at 476 (describing the effect of the state's procedural "brick wall" in creating "a dispirited public opposition, bloodied, exhausted and overwhelmed by the seemingly inexhaustible resources arrayed against it").

the proceedings. The DEC proceedings also provided important opportunities for CCCC's mobilizing efforts in which the citizens group emphasized the importance of public participation for determining the outcome of the review process. These mobilizing efforts further confirmed the view of CCCC activists and supporters, among whom are many local political representatives, that vigorous participation in the formal procedures for environmental review of the proposed project would make a difference. When they found that this was not true, opponents of the landfill proposal turned to other areas of law rather than away from law altogether.¹⁰⁸

CCCC struggles at present "to keep all the balls in the air," a saying that has been common in the organization from its beginning. This means finding every avenue of law and politics that promises to delay the ability of the landfill developer to break ground. Attorneys and legal actions are no less important to the group today than in the beginning of the dispute, but they are very clearly among a number of instruments to be used to achieve victory in the dispute. In Kathy Kellogg's words:

One of the things Charlie [CCCC's first attorney] told me that first time I talked to him on June 11, 1991 was that the Farmersville [fight] is not unique (and even then there were a lot of towns going through the same drama), you just have to beat the dumpers at their own game: hydrogeology and politics. We did it. But you have to keep doing it with a whole

¹⁰⁸ Compare *id.* at 491 (observing on the basis of a 1990 hazardous waste landfill siting dispute in Niagara Falls that notwithstanding stiff policy and procedural obstacles (referred to in the last note, *supra*) "[e]ffective citizen participation in the siting process can occur on several levels" and moreover: "Existing local environmental groups must inform themselves as completely as possible concerning the relevant issues and undertake a community canvass of all residents. Such an undertaking serves many valuable purposes, including raising the sophistication of the community at large, identifying individuals who are willing to participate in the process and providing a reasonable assessment of community sentiment.").

community and a way of life. But we stopped [after the adjudicatory hearings], and the IWS monster is growing again. Another thing Charlie said, just a SEQR [State Environmental Quality Review] action or a lawsuit or a hydrogeologist or a park by themselves don't do it. We have to keep all the balls in the air.¹⁰⁹

Because an instrumentalist approach to the law is substantially shared by the County, IWS, the DEC, and CCCC, the change in legal consciousness that has occurred in the course of the Farmersville dispute is a matter of degree rather than kind. If anything, the local parties have caught up with the extra-local parties' more sophisticated legal instrumentalism.

B. The Parties' Approach to the Dispute is Rooted in Conflicting Concepts of Community and Environment

Conflicting images of community inform each side's approach to the Farmersville landfill dispute. These contrasting frameworks allow each party to believe sincerely their approach to waste production and management is more protective of the community and environment. These frameworks will be referred to here as localism and cosmopolitanism, respectively.¹¹⁰ Such terms are but a shorthand for a complex and subtle intertwining of perception and place in the social order that will only be suggested here.¹¹¹

¹⁰⁹ Letter from Kathy Kellogg to CCCC Board members, October 31, 1996 (on file with the author).

¹¹⁰ Compare BRUCE A. WILLIAMS AND ALBERT R. MATHENY, *DEMOCRACY, DIALOGUE, AND ENVIRONMENTAL DISPUTES: THE CONTESTED LANGUAGES OF SOCIAL REGULATION* (1995) (finding that opposing sides in disputes over toxics use the concept of community differently to justify their positions).

¹¹¹ In sociology, the mobilization-theory approach represents the discipline's dominant bias against culture, explaining social movements in terms of a movement's instrumental mobilization of those resources made available to it by its position in the social structure. However, this approach often fails to appreciate the

Both the DEC and IWS use a cosmopolitan rationale for the environmental value of the landfill proposal: because the people of the state of New York need additional landfill capacity, public health and the environment will benefit from the landfill. It is apparent from their reliance on political jurisdiction (state or national boundaries) rather than on social or equitable criteria that the DEC and IWS believe this larger community is co-extensive with society. There is, from this point of view, a potential "garbage crisis" in society to which the Farmersville landfill proposal is a potential "solution."

A particular way of looking at small communities is characteristic of the cosmopolitan framework. "Host communities" are only one element of the problem of waste management. Small communities asked to host landfills are indistinguishable. Host towns are always located within counties which, when the town exercises local jurisdiction over the siting of a landfill, will divest decision-making authority from the county.¹¹² Whether there is a local need for the proposed landfill, what relation the landfill proposal bears to local planning efforts, or whether there is a relationship between the communities producing waste for the landfill and communities bearing the burden of hosting the landfill are irrelevant. There is no meaningful differentiation among communities within the relevant societal community. The effort by people in Cattaraugus County to make review of the landfill proposal a locational dispute is an annoyance, an aberration, a result of failure of understanding on the part of the locals, or simply the product of local selfishness.

The DEC and IWS act as if they play (or should play) a commanding role in the community in which the problem of waste management is situated. IWS offers a technologically superior

complex and subtle differentiation of culture among the parties to a dispute and incorrectly implies that "culture" motivates one side in a dispute more than the other. For a general discussion of cultural analysis see Roland Robertson, *GLOBALIZATION: GLOBAL CULTURE AND SOCIAL THEORY* (1992). For a discussion of social interpretation see Gary A. Abraham, *Context and Prejudice in Max Weber's Thought*, 6 HIST. HUMAN SCI. 1 (1993).

¹¹² See *supra* note 27 (discussing local government powers in New York).

solution to the problem of waste management and the DEC protects the greatest number with the least burden to the population of New York State. The community in which the problem of waste management is situated consists of all citizens of New York State (or, for IWS, a multi-state region), and the environment is simply the total area New York citizens occupy. The DEC and IWS are therefore protectors of the environment, a role that is inseparable from the way they define the community being protected.

Opponents of the Farmersville landfill proposal act as if communities are (or should be) primarily localities, and localities are comparable, notwithstanding obvious differences in size and complexity. What justifies their scorn at the prospect of hosting urban garbage is rural western New Yorker's comparison of communities and their application of a standard of equivalent responsibilities, a framework that cannot be fit within the cosmopolitan framework required by the current landfill permitting process. This comparative framework underlies the local insistence on equity in siting.¹¹³

From the standpoint of localism, local communities are expected to protect themselves within limits of basic fairness that preclude dumping on other communities. This is true for Cattaraugus County and New York City alike. Local protectionism is therefore a universal principle applicable everywhere and consistent with civility.

The burden imposed on rural western New York communities by urban communities is considered inequitable because urban communities are seen as failing to successfully manage their own waste. Communities have equivalent responsibilities for the burdens created by their own production and management of waste.¹¹⁴ The

¹¹³ For related discussion of the role of comparison in judgment about locally unwanted land uses, see Gary A. Abraham, *Fanning the Flames of NIMBY (Review of Christopher H. Foreman, The Promise and Peril of Environmental Justice)*, 6 BUFF. ENVTL. L. J. 117 (1998).

¹¹⁴ See Letter of May 12, 1999 from Cattaraugus County Legislature Chairman Gerard Fitzpatrick to New York City Mayor Rudolph Giuliani, "request[ing] your written confirmation that New York City will not send any municipal solid waste to Cattaraugus County without the County's consent" ("Cattaraugus County has ample capacity for dealing with its own municipal solid

towns surrounding Farmersville are not happy with the Farmersville town board for this reason. If the landfill is constructed Farmersville will be burdened little more than neighboring towns but will benefit dramatically more as a result of financial benefits provided under its contract with IWS. This, too, is seen as part of the inequity presented by the landfill proposal. However, this aspect of the proposal's inequity is also linked to the urban source of the waste that would go to the landfill. Most local observers understand the constraints the current town board faces, and therefore see the Town of Farmersville as part of the basic unfairness locals call "getting dumped on" by big cities, big developers, and big government.

Despite this sort of local rhetoric the issue for rural western New Yorkers is much more than "large" versus "small." Large landfills are not per se offensive to western New Yorkers. The Ellery Landfill owned and operated by Chautauqua County, for example, is a large "state-of-the-art" modern landfill comparable to commercial landfills proposed elsewhere in Western New York.¹¹⁵ It also releases leachate into the local environment from time to time, as do large landfills elsewhere, and its service area extends to extra-regional waste, since modern landfills cannot remain going concerns on the basis of the waste shed provided by western New York alone. Nevertheless, local people in the region generally distinguish a large locally-controlled landfill participating in the interstate market for waste from a commercial landfill with the same economic role. Consequently, local county landfills have not become a subject of dispute in any way comparable to commercial landfills.

Nor is the issue merely loss of local control. In Cattaraugus County waste management is considered primarily a local responsibility, a view long embraced by New York's law of home rule.¹¹⁶ The imposition of commercial landfills by state and market

waste. We are especially proud of our 40% recycling rate.") (on file with author). Cf. also *infra* note 139.

¹¹⁵ Modern landfills are constructed out of 10- to 15-acre cells, each with their own liners and monitors.

¹¹⁶ See *supra* note 27.

forces is at odds with this way of looking at waste management. The Farmersville landfill proposal is a locational problem not merely because it removes local leaders' ability to meaningfully determine community goals in a field where it is still customary to do so. The theme of local control over landfill siting is intimately linked to the local perception that urban communities, and New York City in particular, enjoy power and control over their own waste and are exercising that power and control at the expense of Cattaraugus County. This unfairness or inequity, not merely loss of local control, is the underlying "issue[] the [local] people involved perceive to be conflict-engendering and the relationship into which conflict is structured" for them.¹¹⁷

The DEC and IWS actively dismiss the principle of local responsibility for waste management. Both explicitly rely on open markets in waste to serve the collective need for waste management as they see it. Apparent locational neutrality is at the heart of both IWS's and DEC's approach. By embracing the principle that a landfill can be put anywhere,¹¹⁸ there are no grounds for deciding one place is better than another.¹¹⁹

¹¹⁷ Nader & Todd, *Introduction*, *supra* note 7, at 8.

¹¹⁸ *See infra* p. 94 .

¹¹⁹ The principle of locational neutrality appears to extend to environmental impacts in the conventional sense, as indicated by the DEC's willingness to grant variances for the depth to groundwater regulations that would otherwise prohibit a siting or constructing a landfill in high water table areas. *See e.g., In the Matter of Hyland Facility Associates, Fourth Interim Decision of the Commissioner* (Zagata), DEC Project No. 9-0232-3/1-0, 1994 N.Y. ENV LEXIS 39, * 2-5 (August 29, 1994) (granting a variance from the requirement of a five-foot separation between the landfill liner and the seasonal high groundwater table, 6 N.Y.C.R.R. § 360-2.13(d), and overturning permit denial of previous DEC Commissioner (Jorling)) (Angelica landfill); *Notice of Public Hearing, Waste Management of New York*, DEC Project No. 8-3420-00019/00005, <<http://www.dec.state.ny.us/website/ohms/notices/wastemgt.htm>> (May 26, 1999) (noticing application for a variance from the requirement that unconsolidated deposits must be constructed to be 20 feet in thickness from the base of the landfill liner system (6 N.Y.C.R.R. § 360-2.12(a)(1)(v) and (vi)) (proposed Albion landfill); *In the Matter of the Application of Integrated Waste Systems, Inc., for*

It is difficult to justify this approach on environmental grounds alone. A policy of locational equity would provide a powerful incentive for reducing waste production in the population centers where most waste originates (and where most benefits of consumption are concentrated), thereby reducing risks to the environment, since more powerful communities that have hitherto succeeded in avoiding hosting a regional landfill would insist on greater environmental protections and higher financial benefits than rural western New York towns have been able to secure. Such a policy would probably also lead very shortly to more equitable distribution of DEC's technical assistance to host communities. This too would probably lead host communities to insist on greater environmental protections and higher financial benefits, enhancing the likelihood that waste management costs would reflect something closer to their true environmental costs. The exclusion of this approach from DEC policy therefore has little to do with achieving environmental protection goals.

There appears at this time no objective grounds to believe that either localism or cosmopolitanism offers a superior approach to the waste management crisis, if only because the definition of "crisis" in this area – whether there is a capacity crisis or a resource-use crisis – seems dictated by the framework one adopts. The Farmersville dispute shows that a clash of ideologies¹²⁰ as much as the objective possibility of substantially reducing the adverse impacts of waste underlies disputes over landfills.

Conceptual Review, *supra* note 85, 1996 N.Y. ENV LEXIS 11, at * 14, 57, 66 (discussing likely need for variances from regulatory requirements for bedrock and groundwater separation distances) (proposed Farmersville landfill).

¹²⁰ Cf. Clifford Geertz, *Ideology as a Cultural System*, in *THE INTERPRETATION OF CULTURES*, text following note 42 (1983) (distinguishing the social scientific concept of ideology from "untruthfulness" and noting ideological conflict arises from "an inability, for lack of usable models, to comprehend the universe of civic rights and responsibilities in which one finds oneself located").

C. "NIMBY" Provides an Inaccurate Description of Opponents of the Farmersville Landfill Proposal

The prevailing view of toxic facility siting disputes portrays opponents as selfish and therefore unwilling to sacrifice for the greater good, a view that often invokes the "NIMBY" metaphor.¹²¹ This view provides an inaccurate portrait of the Farmersville landfill dispute.

In the Farmersville dispute local officials and CCCC repeatedly appealed for respect for the principle of local responsibility for waste management to state political representatives and to national environmental organizations. These appeals reflect a recognition of membership in a wider community. Local opponents' use of the David-and-Goliath image of large forces pitted against small communities to describe the dispute implies something specific about the place of the local community in a larger state and national community. The message of the protectors of Farmersville is that the larger community must accept a certain level of responsibility for the impact of its policies on Farmersville and Cattaraugus County, and that urban communities can accept that responsibility in part by managing their waste as successfully as has Cattaraugus County. That Farmersville's protectors are directing their message outward, and the actual content of their message, indicates that local opponents of the landfill proposal accept and understand that local, state, and national communities are fundamentally interlinked, even if in complex and difficult-to-understand ways.

Although local protectionism may be more amenable to those who live in communities with smaller populations where the experience of anonymity is less dramatic than in larger metropolitan areas, a protectionist idea of community is not simply an assertion of priority for a local community. It is better seen as an assertion of a general principle, that communities are primarily localities, and localities should shoulder the consequences of the environmental

¹²¹*See supra* note 5.

burdens they produce. Contrary to the NIMBY theory, no simple disdain for integration of one's locality into a wider field of social, economic and political forces can be derived from local protectionism. It is more accurate to see in local protectionism a dispute over the way in which the locality ought to be integrated into society.

VI. Postscript

By the end of 1997 IWS showed signs of wear. While its application for conceptual approval was being reviewed the company was forced to sell its garbage hauling contract with the City of Buffalo,¹²² and two years later unable to find a buyer for its last garbage-related subsidiary in Chicago, it was forced to close the business.¹²³ All but bankrupt, in mid-1997 the company was delisted from the stock exchange for failure to make required filings on its financial performance with the Securities and Exchange Commission.¹²⁴

The following year IWS was purchased by a new company headed by IWS's former hydrogeology firm president Bill Heitzenrater. This change of hands occurred in the wake of news that Virginia and Pennsylvania were mounting a new effort to stop New York's export of additional New York City garbage. In the early months of 1999 flow control legislation was again introduced in Congress by Rep. Gilmoor (OH-5)¹²⁵ and by Sens. Robb (D-VA) and

¹²² Thomas J. Dolan, *CID to Buy Contracts of Integrated; Waste Operation Sale to Bring \$8 Million*, BUFFALO NEWS, LOCAL SECTION, November 8, 1994 p. 1.

¹²³ David Robinson, *Local Stocks Beat Major Markets Again*, BUFFALO NEWS, April 1, 1997, p. 3E.

¹²⁴ *Integrated Delisted From NASDAQ Market*, BUFFALO NEWS, June 10, 1997, Business Section, p. 6D.

¹²⁵ H.R. 378 and H.R. 379, authorizing states to regulate importation of out-of-state and out-of-country solid waste, respectively, up to an outright ban on either, was introduced on January 19, 1999.

Warner (R-VA)¹²⁶ and by Sen. Specter (R-PA).¹²⁷ When introducing his flow control legislation, Sen. Specter specifically referred to the threat Fresh Kills' closing poses to Pennsylvania.¹²⁸

The new element in the 1999 push for such legislation is the near unanimous support among Virginia state legislators, Virginia's governor, and Virginia's congressional representatives, driven in large part by a massive canvassing operation started by Virginia environmentalists responding to leaking landfills and increased truck accidents resulting from importation of New York City waste.¹²⁹ Evidence of "cocktailing," or mixing medical and other hazardous waste with permitted solid waste has surfaced, and two of the seven landfills have developed leaks in their liners causing elevated levels

¹²⁶ S. 533, the INTERSTATE TRANSPORTATION OF MUNICIPAL SOLID WASTE CONTROL ACT OF 1999, was introduced on March 4, 1999. The bill would allow states receiving more than one million tons of garbage from out of state in 1998 to cap garbage imports at any landfill within the state at 1998 volume levels. As soon as any other state imports over one million tons that state may also cap its imports as of the year the threshold is reached. Beginning in the year 2001 garbage may be banned from "super-exporting states," i.e. those states exporting more than six million tons of garbage per year. S.533 also allows states to impose a discriminatory fee against out-of-state garbage of \$3 per ton. However, discriminatory fees may be assessed against garbage from "super-exporting" states at the rates of \$25, \$50, and \$100 per ton progressively in the years 2002, 2003, and 2004.

¹²⁷ S.663, the SOLID WASTE INTERSTATE TRANSPORTATION AND LOCAL AUTHORITY ACT OF 1999, was introduced on March 18, 1999. The bill's provisions include a "presumptive ban" on garbage crossing state lines where the proposed host community has not specifically agreed to disposal, an independent grant of authority to states to enact flow control legislation notwithstanding the Commerce Clause, and a prohibition on Commerce Clause challenges to state and local flow control arising from facts prior to the bill's enactment.

¹²⁸ CONG. REC., March 18, 1999, p. S2946.

¹²⁹ Richard Sisk, *Dumping Furor: Va. Sniffs at N.Y. Garbage*, DAILY NEWS (New York), April 4, 1999. 1,750 tons of Bronx garbage per day and 2,400 tons of Brooklyn garbage per day, as well as about 136,000 tons of dried human waste and other sludge, are currently being trucked to seven modern landfills in Virginia, "so large they could not survive on Virginia trash alone." Eric Lipton, *As Imported Garbage Piles Up, So Do Worries*, WASH. POST, November 12, 1998, pp. A1, A14.

of antimony and heavy metals in local groundwater.¹³⁰ Virginia Governor James Gilmore ordered a moratorium on further landfill development and Virginia legislators mounted an effort to authorize local municipal review of siting proposals (already provided under New York law) in addition to encouraging Congress to pass flow control legislation.¹³¹ However, implementation of state legislation to restrict further importation of garbage into Virginia was enjoined on June 30, 1999.¹³² Virginia now accepts 3 million tons of garbage annually from out of state.¹³³

New York City's export plan, in the absence of any meaningful policy for waste minimization,¹³⁴ has heightened speculation in solid waste facilities, leading to new applications for the expansion of existing landfills and proposals for new landfills elsewhere in western New York.¹³⁵ New York City's mayor responded to the calls for federal interstate flow control legislation by confirming his enthusiasm for the export of the city's garbage to upstate communities (and elsewhere) in a way that was perceived as insultingly arrogant by local newspapers.¹³⁶

¹³⁰ *Id.*

¹³¹ Eric Lipton, *Powerful Friends Help Trash Industry Protect Its Interests*, WASH. POST (November 14, 1998), p. A1.

¹³² Waste Management Holdings, *supra* note 23. Virginia's motion to dismiss on the grounds that the host community agreements with commercial landfill operators were extra-local and therefore ultra vires, destroying the operators' standing to sue the state, failed on August 30, 1999. 1999 U.S. Dist. LEXIS 13508.

¹³³ Lipton, *Powerful Friends*, *supra* note 131, at p. A10.

¹³⁴ Minority communities in New York City, faced with new or expanded transfer stations, have raised this issue in response to the City's export plan. See the Internet newsletter BIG APPLE GARBAGE SENTINEL, <<http://pratt.edu/~jmccrory/bags>>.

¹³⁵ Many such proposals, beyond the scope of this article, are noted on the website of Concerned Citizens, created after the events described in the body of this Article. See <<http://www.homestead.com/concernedcitizens>>.

¹³⁶ "A new push for a major landfill in Farmersville has rightly aroused the indignation of area residents. . . . New York City Mayor Rudolph Giuliani's recent ill-advised jibe -- that Virginians should be pleased to take New York City's trash in return for their chances to visit its cultural magnificence -- has triggered a major

An application by IWS for a permit was submitted and rejected by the DEC in December, 1998. In response to demands from the City of Olean and Cattaraugus County, a public scoping meeting was held at the Franklinville fire hall in March 1999. About 400 people attended, in part in response to CCCC efforts, including a mass mailing of 3,500 newsletters to rural mailboxes, guest editorials printed in the Salamanca and Olean city newspapers, meetings with City of Olean and Cattaraugus County governmental bodies, and local radio appearances. However, CCCC was no longer represented by the University at Buffalo legal clinic, which closed the previous year. Much the same scene as occurred in 1994 was reproduced, but with public officials even more vociferous than before in their opposition. Among a number of changes in the

backlash." Editorial, *New York's Garbage*, BUFFALO NEWS, March 29, 1999. "[Olean] Mayor James Griffin and Common Council members reacted angrily Tuesday after reading a New York Daily News article in which members of Mayor Giuliani's administration suggest the proposed Farmersville landfill is a good place for New York City's trash. . . . 'This is typical of New York City's relationship with the rest of the state. I think it's very unfortunate that downstate forces think they understand the nature of our situation better than we do. But I'm not surprised,' Mayor Griffin said. . . . 'The more upstate is involved, it deflates some of the arguments of Pennsylvania and Virginia,' Joseph Lhota, deputy New York City mayor, admitted in [a recent] Daily News article." John Eberth, *Alderman Raise a Stink About Giuliani*, TIMES HERALD, April 15, 1999.

proposal made by IWS is a request for additional permitted capacity and a widening of the landfill's service area to include the New York City metropolitan region.¹³⁷

This time the resolve of elected officials and concerned citizens alike was hardened by connections to the regional and national policy context that had become even more clear. The local and New York City newspapers portrayed the region as under siege from New York City garbage nobody else would take, and the county's attorney was quoted in the *New York Daily News*.¹³⁸ The Chairman of the Cattaraugus County Legislature wrote to Mayor Giuliani in May, 1999, asking for confirmation of New York City's policy requiring consent from any community hosting the city's garbage. The Mayor's office wrote back that counties are not "communities" for purposes of the policy; rather, "the disposal of waste should be a matter left to the decisions made by the local governments and private sector companies involved."¹³⁹ As the

¹³⁷ IWS now proposes to landfill 915,000 tons of solid waste per year. The original proposed capacity of the Farmersville dump was 450,000 to 690,000 tons per year. Integrated Waste Systems, Inc., DRAFT ENVIRONMENTAL IMPACT STATEMENT, SITE SELECTION STUDY REPORT, vol. 1 of 3, Appendix B, p. 14 (August 23, 1993).

¹³⁸ "As a rural community trying to lure hunting and fishing enthusiasts, 'We do not want the intrusion of hundreds of thousands of New York City garbage trucks despoiling the natural environment, and we are not a regional garbage dump,' said Michael Gerrard, an attorney battling a soon-to-be built landfill [in Farmersville] near Buffalo. . . . Bill Heitzenrater, who has a preliminary permit [sic] for a 137-acre landfill in Farmersville (pop. 400 [sic]), 40 miles south of Buffalo, is hungry for the city's trash. . . . 'The entire county is up in arms,' said lawyer Gerrard, who represents Cattaraugus County in a fight against the landfill." Lisa Rein, *City Trash is Headed Upstate: Hauler Interest, Rural Unease as Fresh Kills Closing Nears*, DAILY NEWS (New York), April 6, 1999. See also Associated Press, *Upstate Sites Being Eyed for New York City Trash*, PALLADIUM TIMES (Oswego, N.Y.), April 8, 1999, p. 1 (quoting William Heitzenrater on the state-wide need for a new landfill in Farmersville).

¹³⁹ The exchange of letters, including direct quotations from the exchange, is reported on CCCC's website, <<http://homestead.com/concernedcitizens/newspagenew.html>>.

Chairman feared, this meant New York City would rely on privately arranged agreements with small towns at the expense of counties.

As of late 1999 the DEC is reviewing IWS's latest supplemental EIS for completeness.¹⁴⁰ The scheduling of further hearings in IWS's permit application is not expected until the end of the year.

¹⁴⁰ See John F. Bonfatti, *Impact Statement on Planned Dump Changed*, BUFFALO NEWS, August 13, 1999, p. 5C.

